**WD86617**

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**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

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

**vs.**

**SOO LINE RAILROAD COMPANY,**
**Defendant / Respondent.**

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

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# REPLY BRIEF OF THE APPELLANT

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## Reply Argument

Shirley Ralls appeals from a judgment accepting a jury's verdict in favor of the Soo Line Railroad, her late husband James Ralls' former employer, in her wrongful-death negligence action for damages against Soo Line under the FELA (D2; D97). Mrs. Ralls alleged that Mr. Ralls' exposure to the known carcinogens silica dust and diesel exhaust during his work for Soo Line caused or contributed to his developing lung cancer, from which he died (D2; Tr. 896-931).

### I. The trial court erred in allowing Dr. Thompson to give expert testimony on specific causation when Soo Line never disclosed him as an expert.

#### A. Summary of argument in opening brief

In her first point in her opening brief, Mrs. Ralls explained the trial court erred in allowing Soo Line to elicit expert testimony on causation from one of Mr. Ralls' treating physicians, Dr. Mark Thompson, M.D., for the first time at trial without having disclosed him as a retained or non-retained expert or updated its disclosures (Brief of the Appellant ["Aplt.Br."] 31-41). Under Rule 56.01(b), the failure to disclose a witness as an expert generally precludes that witness from being allowed to provide expert testimony for the first time at trial (Aplt.Br. 33-37).

Here, 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, it disclosed some retained experts (Aplt.Br. 37). But Soo Line did not disclose Dr. Thompson as either a retained or non-retained expert, nor did it ever supplement those disclosures as Rule 56.01(e)

required so as to disclose Dr. Thompson as a retained or non-retained expert (Aplt.Br. 37-39). Instead, Soo Line falsely claimed to the trial court that it *had* disclosed Dr. Thompson as an expert (Aplt.Br. 37-38) (citing Tr. 573).

The trial court's decision to allow Dr. Thompson to offer expert specific causation testimony despite this lack of disclosure prejudiced Mrs. Ralls (Aplt.Br. 39-41). Only in his trial testimony did Mrs. Ralls first learn Dr. Thompson was going to be rendering what he stated was a definitive opinion on the cause of Mr. Ralls' lung cancer and what his basis was for this new opinion (Aplt.Br. 39-40). And it allowed Soo Line to argue to the jury that unlike both parties' other experts, Dr. Thompson was specially credible because he was not paid (Aplt.Br. 40-41).

**B. Mrs. Ralls did not know during discovery that Dr. Thompson was going to be called as an expert, nor was she informed of his expert opinions or the factual bases for them, or that anything from the time of his deposition had changed.**

In response, Soo Line first argues that "all information required for disclosure was known to [Mrs. Ralls] during discovery" (Brief of the Respondent ["Resp.Br."] 15) (capitalization removed).

Soo Line argues this is because "Dr. Thompson was a non-retained expert," so under Rule 56.01(b)(7) all it would have had to disclose was his "name, address, and field of expertise," and "[d]iscovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses" (Resp.Br. 15) (quoting Rule 56.01). It argues Mrs. Ralls was not surprised because she "knew Dr. Thompson's name, address, and field of expertise" and "[i]t is undisputed that [she] had the

ability to discover the facts and opinions held by Dr. Thompson in the same manner she would with any other witness" (Resp.Br. 16).

Soo Line skips over the real issue. Yes, Mrs. Ralls knew Dr. Thompson's name and address. She also knew he was a radiation oncologist. Indeed, the reason she knew Dr. Thompson was a witness at all was because he treated Mr. Ralls (Tr. 569). Because Mr. Ralls' course of treatment was relevant to her damages claim, she endorsed Dr. Thompson as a potential witness at trial (D72).

*But Mrs. Ralls did not know Dr. Thompson would be testifying as an expert*, and so had no idea – and was surprised by the fact – that he had expert opinions at all. As such, she could not discover his ultimate expert opinions and facts on which he based those expert opinions because he was undisclosed as an expert in the first place.

So, Mrs. Ralls had no reason to take Dr. Thompson's deposition as an expert, nor did she. It was *Soo Line* who took his discovery deposition (D52 p. 3), which Mrs. Ralls' counsel thought was going to be about his medical records given he was a treating physician. At no time during that deposition did Soo Line offer him as an expert, either (D52 pp. 3-9). So, it is not "undisputed" that Mrs. Ralls was able to discover Dr. Thompson's expert opinions and the facts on which he based those opinions. She was not, as Soo Line did not inform her it was calling him as an expert to begin with. And that Mrs. Ralls' "counsel could have spoken with Dr. Thompson at any time they wished, without Soo Line present," is a distinction without a difference. They had no idea he was going to offer expert opinions at all.

To that end, Soo Line's recitation of Dr. Thompson's deposition as allowing Mrs. Ralls' counsel to "questio[n] Dr. Thompson on his causation opinion, methodology, factual background, and treatment" (Resp.Br. 16), as well as its recounting of his deposition in its statement of facts (Resp.Br. 7-9) omits Dr. Thompson's actual conclusions there. It says the deposition disclosed "Dr. Thompson's specific causation opinion, effectively giving notice to trial counsel for [Mrs. Ralls] that Dr. Thompson may provide expert opinion testimony" (Resp.Br. 19-20). This is untrue.

At the deposition, Dr. Thompson conceded he *could not* 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 "can't say" what caused Mr. Ralls' cancer (D52 pp. 7-8).

In short, Soo Line never disclosed Dr. Thompson as an expert, he did not give expert opinions or factual bases for them at his deposition, and Soo Line never supplemented its interrogatory answers to disclose Dr. Thompson was a non-retained expert. As a result, Mrs. Ralls simply had no opportunity to know Dr. Thompson was going to offer expert testimony on specific causation at trial, what those expert opinions were, or the facts on which he based them.

### C. Soo Line's failure to disclose Dr. Thompson as a non-retained expert prejudiced Mrs. Ralls.

Next, Soo Line argues Mrs. Ralls "was not prejudiced by [its] failure to formally disclose Dr. Thompson as an expert witness" (Resp.Br. 16) (capitalization removed). It says this is because Mrs. Ralls had other experts to rebut Dr. Thompson (Resp.Br. 19), she "had every opportunity to challenge the reliability of Dr. Thompson's opinions," and she "never sought a continuance of the trial" (Resp.Br. 20). It says, as a result, Mrs. Ralls cannot meet the abuse-of-discretion standard (Resp.Br. 20-21). This is wrong.

First, the fact that Mrs. Ralls had causation experts of her own is immaterial. She simply had no idea Dr. Thompson was going to be offered as a non-retained expert, what expert opinions he was going to give, or what the factual bases for those opinions were. Consequently, she had no ability to, say, provide her experts with a deposition transcript or expert report for those experts to study and rebut.

Soo Line's discussion of the decisions Mrs. Ralls invoked in her opening brief bears this out. It is incorrect that the complaining parties there did not have their own experts. Rather, the problem was that they did not know a witness was going to be an expert. In *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648-49 (Mo. banc 1997), a medical malpractice case, the Supreme Court affirmed barring a treating physician from testifying as an expert witness on causation, though allowing him to testify as to his treatment.

Soo Line says that in *Wilkerson*, the problem was the party there failed to disclose the treating physician as a witness *at all* (Resp.Br. 17). That is not correct, and in the face of Soo Line's argument is a distinction without a

difference. The defendants there still had their own experts on causation and the deposition of the treating physician in question had been taken (at which, like Dr. Thompson, he did not testify as to causation). *Id.* at 645-46. Soo Line's suggestion that "the party opposing the expert testimony would not have known the identity of the expert" at all (Resp.Br. 18) is incorrect.

The problem was not that the defendants did not know the treating physician *was going to be a witness*, but that, like Dr. Thompson, he was not disclosed *as an expert witness on causation*. *Id.* at 648-49. As Soo Line recounts, the *Wilkerson* "defendants were entitled to rely on the plaintiff's discovery responses to determine who they should depose," and "[b]ecause the plaintiff did not disclose her treating physician in her interrogatory responses, defendant was foreclosed from deposing the physician or hiring an expert to rebut his testimony" (Resp.Br. 17). Like Mrs. Ralls here, this was despite the fact the defendants in *Wilkerson* had their own causation experts and also had the ability to depose the treating physician.

*Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 720 (Mo. App. 2014), a breach-of-construction-contract case, was similar. There, the party disclosed its retained expert witness, but only five weeks before trial and months after a deadline, and the opposing party "had already commenced deposition of the expert." *Id.* at 718. At the same time, the substance of the expert's testimony was addressed "through other evidence." *Id.* at 721 n.11. Despite this, excluding that expert was proper, because the opponent "would have no realistic opportunity to review the documents [the expert] relied on,

depose [him], and, if necessary, retain and prepare an expert witness of its own to rebut [the expert]'s testimony." *Id.* at 720.

What happened here is even worse: Dr. Thompson was not held out as a non-retained defense expert *until during the trial itself*. Mrs. Ralls' counsel had no idea what his expert opinions were going to be, or on what facts he based them, until his very trial testimony. Even though other testimony also addressed what the cause of Mr. Ralls' cancer was, Mrs. Ralls had no realistic opportunity to know Dr. Thompson's expert opinions or the facts on which he based them and prepare any contrary experts.

The two decisions Mrs. Ralls cited in which this Court *reversed* the admission of an undisclosed expert's testimony are even more similar, and Soo Line's attempts to distinguish them are even more misplaced.

Soo Line says that in *Manahan v. Watson*, 655 S.W.2d 807, 808-09 (Mo. App. 1983), a personal injury case, the issue was that "the defendant did not disclose his expert witness until he called the expert to testify on the third day of trial" (Resp.Br. 18). That is true, but the point was that the plaintiff had no knowledge the person would be testifying as an expert before then. Mrs. Ralls, too, had no idea before trial that Soo Line would call Dr. Thompson as an expert or what his expert opinion and facts would be.

Soo Line ignores that *St. Louis Cnty. v. Pennington*, 827 S.W.2d 265, 266 (Mo. App. 1992), is directly on point. It says the expert "Fey was identified as a fact witness but provided expert testimony in the areas of architecture and engineering during trial" (Resp.Br. 18). That is *exactly* what happened here. Mrs. Ralls knew Dr. Thompson was as fact witness (D72).

But like Fey in *Pennington*, until trial, she did not know Soo Line would use him as an expert witness, let alone his opinions or the factual bases for them. Mrs. Ralls explained this in her opening brief in more detail (Aplt.Br. 40), to which Soo Line offers no response. Like the County in *Pennington*, Mrs. Ralls was under no obligation to ask for a continuance. Instead, the proper result was, like in *Wilkerson*, to exclude Dr. Thompson from providing expert testimony and limit him to testimony about his treatment only.

In her opening brief, Mrs. Ralls explained that she was further prejudiced because Soo Line argued Dr. Thompson's non-retained status was a special sign of credibility (Aplt.Br. 40-41) (citing Tr. 957). Soo Line responds that Mrs. Ralls "had every opportunity to challenge the reliability of Dr. Thompson's opinions" (Resp.Br. 20). This is not so. She was effectively precluded from cross-examining Dr. Thompson because of the absence of forewarning of his testimony. 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 was because she had no knowledge of what expert opinion and basis he would give at trial, *because* he was never disclosed.

Soo Line briefly says "[t]here was never any intent to mislead Appellant by failing to formally disclose Dr. Thompson as an expert witness" (Resp.Br. 19). But it never addresses the fact that its counsel *explicitly* told the trial court that it *had* disclosed Dr. Thompson as an expert (Tr. 573), which as Mrs. Ralls pointed out in her opening brief Soo Line knew was *false* (Aplt.Br. 37-38). It tries to downplay this as arguing "Dr. Thompson's opinions were disclosed through his initial deposition" (Resp.Br. 11) (citing

Tr. 572-573). That is not what its counsel said at all. Instead, Soo Line's counsel said, "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) (emphasis added). This was untrue, and Soo Line's counsel knew it.

Finally, Soo Line points to *State ex rel. Mo. Hwy. & Transp. Comm'n v. Dooley*, 738 S.W.2d 457, 463 (Mo. App. 1987), in which it says the Court affirmed allowing an expert "who was not timely disclosed" (Resp.Br. 21). That is not a fair reading. There was no scheduling order there to make the disclosure "untimely." *Id.* Instead, two weeks before trial, the party filed supplemental interrogatory answers giving new opinions by its existing experts and adding a new expert. *Id.* at 459. This Court held the disclosure *was* timely, because it fulfilled the party's duty to "seasonably" update them. *Id.* What this Court *actually* held was: "The trial court reasonably hold [*sic*] that supplementing the interrogatories and informing counsel under the circumstances here satisfied the requirement of 'seasonably to supplement' required by Rule 56.01(e)(1)(B)." *Id.* at 463.

Soo Line's conduct below bears no resemblance to *Dooley*. It did not disclose Dr. Thompson as an expert at all, either in its initial or any supplementary answer to Mrs. Ralls' interrogatories. She was never apprised that he was a non-retained causation expert, what his expert opinions were, or the factual bases for those opinions. She had no ability to meaningfully cross-examine him or have another expert rebut him.

This Court should order a new trial.

## II. The trial court erred in allowing Dr. Thompson to give expert testimony at trial that differed from his opinions and bases in his discovery deposition.

### A. Summary of argument in opening brief

In her second point, Mrs. Ralls explained that the trial court also abused its discretion in allowing Dr. Thompson to testify to opinions and factual bases for them that differed from those in his discovery deposition without disclosing the different opinions and bases (Aplt.Br. 42-53).

The failure to advise an opponent of an expert witness's new or changed opinion or basis before trial generally precludes that witness from being allowed to provide that new or changed opinion or basis at trial (Aplt.Br. 43-48). When this occurs, the proper action is to exclude the new testimony that was not disclosed (Aplt.Br. 43-48).

Here, the trial court allowed 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 (Aplt.Br. 48-53). In his discovery deposition, he only discussed a note from his medical records and one study about smokers and lung cancer, and ultimately conceded he could not give any actual causation opinion (Aplt.Br. 48-50). Then, in his trial deposition, for the first time, he stated he could definitively state Mr. Ralls' lung cancer was caused solely by smoking and not any railroad exposures and offered entirely new factual bases for this in the form of numerous materials, none of which Soo Line had apprised Mrs. Ralls (Aplt.Br. 50-51). This genuinely surprised Mrs. Ralls, prejudicing her and requiring a new trial (Aplt.Br. 51-53).

### B. Dr. Thompson's deposition and trial testimony were materially different.

In response, Soo Line first argues Dr. Thompson gave the same testimony at his discovery deposition and at trial (Resp.Br. 22-29). It says, "While Dr. Thompson used words such as 'assume' and 'guess'" in his discovery deposition, he "rendered a specific causation opinion … that was couched in expert analysis" (Resp.Br. 24). It says his trial testimony was the same, only with additional studies he found (Resp.Br. 25-26).

Soo Line's argument wrong. As with its argument in opposition to Mrs. Ralls' first point, it fundamentally ignores that Dr. Thompson stated at his discovery deposition that he "**can't** render a correct opinion" because he had no data on which to base it (D52 pp. 7-8) (emphasis added). This was because all he had reviewed was "a little two-page consult note that I have" (D52 pp. 7-8). He testified that if he *were* asked to provide a causation opinion, he would "review [the patient]'s 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 admitted he did not apply a methodology in Mr. Ralls' case to determine the cause of his lung cancer (D52 p. 6). When asked what opinion he had regarding whether silica dust or diesel exhaust caused or contributed to Mr. Ralls' lung cancer, he stated he could not say (D52 pp. 5-6).

Dr. Thompson *did not*, as Soo Line argues, state in his discovery deposition "to a reasonable degree of medical certainty that Decedent's smoking, rather than his work at Soo Line, was the cause of Decedent's lung cancer" or "conclud[e] that [Mr. Ralls'] lung cancer was caused by smoking"

(Resp.Br. 24). He did not "stat[e] that it was his opinion that smoking was the cause of decedent's lung cancer" (Resp.Br. 27).

Conversely, at trial, for the first time Dr. Thompson *did* state a definitive causation opinion (Aplt.Br. 50-51). This *was* a change in "his ultimate opinion between his first deposition and his trial testimony" (Resp.Br. 29). He conceded at his deposition that he *could not* opine on causation and had *no* facts from which to do so, but then testified at trial that he *could* render a causation opinion and *had* facts from which to do so.

Making what is conceded to be a supposition or guess in a discovery deposition but then testifying to a concrete opinion in trial testimony is a material difference that requires disclosure of that new opinion and its basis (Aplt.Br. 45-47) (discussing *Green v. Fleishman*, 882 S.W.2d 219, 221-23 (Mo. App. 1994), and *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 475 (Mo. App. 2002) (Russell, J.)). In both *Green* and *Whitted*, the experts testified in their discovery depositions that they could not be sure as to causation due to a lack of data, but then at trial testified they now had sufficient data and could render a causation opinion (Aplt.Br. 45-47). In both cases, a new trial was ordered and this Court affirmed, holding that the deposition testimony differed from the trial testimony, which was not disclosed before trial (Aplt.Br. 45-47). Tellingly, Soo Line does not address *Green* at all and only cites *Whitted* in passing without addressing its holding, either (Resp.Br. 26).

Instead, Soo Line suggests this case is like *Eagan v. Duello*, 173 S.W.3d 341 (Mo. App. 2005), where it says the Court "found that it is not an abuse of discretion for a trial court to admit expert testimony where the testimony

expands on the opinions expressed in a deposition or do not contradict the deposition testimony" (Resp.Br. 26). *Eagen* is entirely inapposite.

At the outset, Soo Line omits that this issue was not preserved in *Eagen*, so the Court was reviewing for plain error. 173 S.W.3d at 348. Conversely, the issue here is fully preserved for review.

More importantly, Soo Line is wrong that in *Eagen*, a medical malpractice case, the expert "was consistent in her ultimate opinion that she was not sure of the actual cause" of the plaintiffs' injury, a tissue dehiscence (Resp.Br. 26). To the contrary, "during his deposition [the expert] stated that infection was the sole cause of [the plaintiff]'s dehiscence, yet he also stated that her bowel movement, subsequent to surgery, was an 'inciting factor.'" 173 S.W.3d at 348. At trial, the expert equally testified that the "reason there was a dehiscence here was an infection," and "the complicating factor of the bowel movement was involved also." *Id.* at 349 (emphasis removed). Therefore, the expert "did not change his opinion as to the cause …." *Id.* Unlike here, *Green*, or *Whitted*, there was no supposition or guess in the deposition and definitive causation opinion later.

Soo Line also points to one study Dr. Thompson cited in his trial testimony, Silverman, and argues Mrs. Ralls was not prejudiced by it because one of her experts had cited it, too (Resp.Br. 27-29). While Mrs. Ralls mentioned the Silverman study in her opening brief, it was not to single it out or even argue "that Dr. Thompson would not have found the Silverman study but for the involvement of Soo Line" (Resp.Br. 31), but instead to show

that Soo Line's counsel had provided him with literature before his trial testimony (Aplt.Br. 51).

Mrs. Ralls' point in mentioning the studies was that besides Silverman, Dr. Thompson also cited numerous other websites and articles (D84 pp. 6-8), which Soo Line does not address. But Mrs. Ralls' counsel was not apprised of any of them beforehand, even though Dr. Thompson clearly had them handy and Soo Line's counsel knew to ask about them (D84 pp. 6-8).

Soo Line argues this is like *Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 351 (Mo. App. 2013), in which it says this Court held "a trial court does not abuse its discretion in allowing the testimony of an expert who relies on documents not mentioned during his initial deposition" (Resp.Br. 27). Soo Line misstates the facts of *Snellen*, which are inapposite. There, it was *not true* that "a testifying expert, relied on a document … ("ACOG document") in his trial testimony, while he did not discuss the document in his initial deposition" (Resp.Br. 27). Instead, at the discovery deposition:

> [defense] counsel asked [the expert] whether [the expert] had provided to him "a document or report that was prepared by a consensus task force on cerebral palsy." [The expert] replied that he had, and he described the ACOG document. [The plaintiff's] counsel then asked: "So you won't be relying on it at trial?" At that point, [defense] counsel interjected: "He may be relying upon it at trial. That's what I'm telling you." In response to a follow-up question from [the plaintiff]'s counsel, [the expert] stated: "I did not review that document as part of my review of the records, but that is one piece of information that we did discuss and I did share with [[defense] counsel], because I was aware of it."

422 S.W.3d at 351. Defense counsel then sent the plaintiff's counsel the ACOG document. *Id.* Moreover, unlike here, there was no change in the

substance of the expert's testimony between the deposition and the trial. *Id.* at 353. Therefore, this Court held that there was no difference between the expert's deposition and trial testimony that required exclusion. *Id.*

This case is nothing like *Snelling*. Dr. Thompson testified in his deposition that he could not render a causation opinion and had no facts from which to do so. In his trial testimony, for the first time he rendered causation opinions and cited numerous materials found nowhere else in the record, and which were never provided to Mrs. Ralls or her counsel. As in *Green*, *Whitted*, and the other authority Mrs. Ralls cited in her opening brief, the trial court should have excluded Dr. Thompson's new opinions and basis from trial, and its failure to do so prejudiced Mrs. Ralls.

**C. The update rule applies equally to retained and non-retained experts.**

At the end of its argument as to Point II, Soo Line argues it could not have disclosed Dr. Thompson's change in opinion to Mrs. Ralls because he was a non-retained expert and so it had no control over him (Resp.Br. 29-32). It argues Mrs. Ralls did not point to a decision where the requirement to disclose a new opinion after a discovery deposition applied to a non-retained expert, and points to *Beaty v. St. Luke's Hosp. of Kan. City*, 298 S.W.3d 554, 559 (Mo. App. 2009) (Resp.Br. 29-30).

Soo Line is incorrect that disclosure and update requirements apply differently to retained and non-retained experts – and notably cites no authority holding so, either, including *Beaty*. Indeed, in *Beaty*, unlike here, "[t]he defendants fully complied with Rule 56.01(b)(5) by listing [the plaintiff's treating physician] as a non-retained expert in response to the

[plaintiffs]' interrogatory requests." 298 S.W.3d at 559. The plaintiffs argued the defendants had to make the physician available for a deposition. *Id.* This Court simply held there was no reason the plaintiffs could not have noticed the deposition themselves. *Id.* There was no statement that because the expert was non-retained, once he *had* been deposed and changed his opinion or the basis for it, the defendants did not have to disclose it.

While it appears no Missouri decision has discussed this, it is well-established nationwide that the same requirements to update an expert's opinion apply equally to a non-retained expert. For example, Federal Rule of Civil Procedure 26(e) provides that parties must supplement their disclosures or discovery responses if they change. Decisions throughout the country, including in Missouri, have held this applies equally to non-retained experts just as it does to retained experts. *See, e.g.*, *Henry v. Johnson*, No. 16-4249-CV-C-WJE, 2018 WL 10158856, at *3 (W.D. Mo. July 10, 2018) (imposing the same requirements regardless whether expert is retained or non-retained, excluding expert for lack of disclosure of opinion); *Stafford v. Gov't Empls. Ins. Co.*, No. 1:15CV414-HSO-JCG, 2017 WL 5690948, at *4 (S.D. Miss. July 20, 2017) ("Regardless of whether an expert witness is a retained expert … or a non-retained expert … Rule 26(e)(1) further provides that parties must supplement their disclosures;" applying this to plaintiff's treating physician, excluding him from testifying to new materials and opinions not previously disclosed timely). *See also Lee v. Knutson*, 112 F.R.D. 105, 108 (N.D. Miss. 1986) (explaining in detail why Rule 26's disclosure and update requirements

apply equally to both retained and non-retained experts); *Chakales v. Hertz Corp.*, 152 F.R.D. 240, 242 (N.D. Ga. 1993) (same).

Other states' courts have held the same under their similar rules. *See, e.g.*, *Easterling v. Kendall*, 367 P.3d 1214, 1223 (Idaho 2016) (same supplementation requirements apply for non-retained experts) (citing *Clark v. Raty*, 48 P.3d 672, 675 (Idaho App. 2002) (same; party has "a duty to seasonably update [non-retained expert's] answers)). *Steffensmier v. Huebner*, 422 P.3d 95, 99-100 (Mont. 2018) (affirming exclusion of non-retained treating physician expert's causation opinion at trial where he did not make causation opinion during discovery deposition).

This makes sense, because Dr. Thompson was *Soo Line*'s witness. As in all these other cases, Soo Line's counsel clearly knew beforehand the questions to ask him and the answers they would elicit in his trial deposition. Therefore, it had to disclose his new opinions and factual bases for them in seasonable advance of his trial testimony. It did not. Notably, Soo Line never made this argument below (Tr. 572-73) or showed it "did not communicate with Dr. Thompson outside of scheduling and prior to the depositions" (Resp.Br. 31), which it states not citing the record. If it had, the Court and the parties could have hashed out whether Soo Line's counsel did, in fact, know what Dr. Thompson was going to testify at trial. From the trial deposition, it is plain that Soo Line certainly could have disclosed Dr. Thompson's new opinions and bases for them beforehand.

The trial court should have excluded Dr. Thompson's new opinions and basis from trial. The trial court abused its discretion in holding otherwise.

## III. The trial court erred in allowing Dr. Thompson to provide expert testimony that failed to meet the standards of § 490.065, R.S.Mo., and *Daubert*.

For the most part, any reply Mrs. Ralls would give on her third point, that the trial court erred in concluding Dr. Thompsons's testimony met the foundational and reliability standards of § 490.065, R.S.Mo., and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (Aplt.Br. 54-64), would be re-argument.

One part of Soo Line's argument warrants a reply. It argues Dr. Thompson performed a differential diagnosis (actually called a differential etiology analysis), "by which an expert determines the possible causes of a patient's symptoms, then rules out possibilities until only one is left," which is a reliable methodology for determining specific causation (Resp.Br. 38). It argues Dr. Thompson engaged in this and then "rule[d] out diesel exhaust and silica as significant causes" (Resp.Br. 39).

At no time did Dr. Thompson state that he performed a differential diagnosis, ruling in possible causes and ruling out others in a scientific manner (D84). He did not give *any* methodology for reaching his conclusions. Instead, with no information about Mr. Ralls' work or what the other experts had said, he looked at cherry-picked studies without considering any contrary literature or analysis and made his conclusions (Aplt.Br. 62-63). That is not a differential etiology analysis, and is not a reliable scientific methodology.

The trial court misapplied § 490.065 and *Daubert* in holding Dr. Thompson's specific causation opinion satisfied those standards.

## Conclusion

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

Respectfully submitted,

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## 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 5,114 words.

/s/Jonathan Sternberg
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## Certificate of Service

I certify that I signed the original of this reply brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on September 13, 2024, I filed a true and accurate Adobe PDF copy of this reply brief of the appellant via the Court's electronic filing system, which notified the following of that filing:

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