TITLE LIII
PROCEEDINGS IN COURT

CHAPTER 516
WITNESSES

Competency of Witnesses, etc.

Section 516:29-a

516:29-a Testimony of Expert Witnesses. –

I. A witness shall not be allowed to offer expert testimony unless the court finds:

(a) Such testimony is based upon sufficient facts or data;

(b) Such testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case.

II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

(1) Have been or can be tested;

(2) Have been subjected to peer review and publication;

(3) Have a known or potential rate of error; and

(4) Are generally accepted in the appropriate scientific literature.

(b) In making its findings, the court may consider other factors specific to the proffered testimony.

Source. 2004, 118:1, eff. July 16, 2004.

TITLE LIII
PROCEEDINGS IN COURT

CHAPTER 516
WITNESSES

Competency of Witnesses, etc.

Section 516:29-b

516:29-b Disclosure of Expert Testimony in Civil Cases. –

I. A party in a civil case shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the New Hampshire rules of evidence.

II. Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report signed by the witness. The report shall contain a complete statement of:

(a) All opinions to be expressed and the basis and reasons therefor;

(b) The facts or data considered by the witness in forming the opinions;

(c) Any exhibits to be used as a summary of or support for the opinions;

(d) The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;

(e) The compensation to be paid for the study and testimony; and

(f) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

III. These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

IV. The deposition of any person who has been identified as an expert whose opinions may be presented at trial, and whose testimony has been the subject of a report under this section, shall not be conducted until after such report has been provided.

V. The provisions of this section shall not apply in criminal cases.

Source. 2004, 118:1. 2005, 279:1, eff. July 22, 2005. 2013, 65:1, eff. Jan. 1, 2014.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the New Hampshire Supreme Court. Evidence which is not relevant is not admissible.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

RULES OF EVIDENCE

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

RULES OF EVIDENCE

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

RULES OF EVIDENCE

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reason therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Browse Previous Page | Table of Contents | Browse Next Page

Rules of Evidence Table of Contents

Browse Previous Page | Table of Contents | Browse Next Page
Superior Court Civil Rules Table of Contents

RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE APPLICABLE IN CIVIL ACTIONS

CIVIL RULES 1 TO 54

V. DISCOVERY

Rule 27. Expert Witnesses

(a) Within 30 days of a request by the opposing party, or in accordance with any order of the court issued pursuant to Rule 5, a party shall make a disclosure of expert witnesses (as defined in Evidence Rule 702), whom he or she expects to testify at trial.

(b) Said disclosure shall conform with RSA 516:29-b, unless waived by agreement of the parties.

Browse Previous Page | Table of Contents | Browse Next Page

Superior Court Civil Rules Table of Contents

Rule 26. Duty to Disclose; General Provisions Governing Discovery [Effective December 1, 2015].

Federal Rules

Federal Rules Of Civil Procedure

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Title V. DISCLOSURES AND DISCOVERY

As amended through December 1, 2015

Rule 26. Duty to Disclose; General Provisions Governing Discovery [Effective December 1, 2015]

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a) (1) (B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information-along with the subjects of that information-that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy-or a description by category and location-of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party-who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures -In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures -For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the

court, this disclosure must be accompanied by a written report - prepared and signed by the witness - if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is notrequired to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a) (1) and (2) , a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness-separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence-separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a) (3) (A) (ii) ; and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a) (3) (A) (iii) . An objection not so made-except for one under Federal Rule of Evidence 402 or 403-is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b) (2) (C) . The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording - or a transcription

of it - that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending - or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a) (5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) , except in a proceeding exempted from initial disclosure under Rule 26(a) (1) (B) , or when authorized by these rules, by stipulation, or by court order.

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General. A* party who has made a disclosure under Rule 26(a) -or who has responded to an interrogatory, request for production, or request for admission-must supplement or correct its

disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is 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; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a) (2) (B) , the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a) (3) are due.

(f) Conference of the Parties; Planning For Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a) (1) (B) or when the court orders otherwise, the parties must confer as soon as practicable-and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b) .

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a) (1) ; discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a) , including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including - if the parties agree on a procedure to assert these claims after production - whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c) .

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b) ; and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a) (1) or (a) (3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name-or by the party personally, if unrepresented-and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial

justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

History. As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 29, 2015, eff. Dec. 1, 2015.

Page 358

113 N.H. 358 (N.H. 1973)

306 A.2d 789

Reginald WILLETT et al.

v.

GENERAL ELECTRIC COMPANY et al.

No. 6616.

Supreme Court of New Hampshire.

June 29, 1973

Fisher, Parsons, Moran & Temple, Dover (Robert E. Fisher, Dover, orally), for plaintiffs.

Burns, Bryant, Hinchey, Cox & Shea and James F. Early, Dover (Mr. Early orally), for defendant General Electric Co.

{306 A.2d 790}

KENISON, Chief Justice.

The issue in this products liability case is whether the defendant General Electric Company may discover the reports of all plaintiffs' experts who examined the refrigerator which allegedly exploded, regardless of whether plaintiffs intend to use the reports at trial or whether they are favorable or unfavorable to plaintiffs' case. General Electric filed a motion for discovery in superior court requesting the court to permit the defendant to examine the refrigerator and to '(d)ecree that plaintiffs' attorney furnish your

Page 359

defendant with access to or copies of all reports and/or memoranda, past, present, and future, either in the possession of plaintiffs' attorney or the 'experts' used by the plaintiffs in examining said refrigerator.' The Court (Mullavey, J.) granted this motion, and the plaintiffs' exception thereto was transferred to this court.

Plaintiffs contend that they should not be compelled to release to the defendant the reports of every expert consulted because such reports represent the work product of plaintiffs' attorney and are thus beyond the reach of discovery. The position of the defendant in seeking discovery of the reports is that the condition of the refrigerator may have changed since the inspections of plaintiffs' experts and that all of their reports should thus be discoverable in order to 'contribute to the orderly dispatch of judicial business.' *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 278, 220 A.2d 751, 753 (1966); RSA 491:App. R 60(e) (Supp.1972).

Recent decisions of this court have stressed the importance of broad pretrial discovery. *E.g., Calderwood v. Calderwood*, 112 N.H. 355, 296 A.2d 910 (1972); *Scontsas v. Citizens Ins. Co.*, 109 N.H. 386, 253 A.2d 831 (1969); Riddle Spring Realty Co. v. State, supra; *McDuffey v. Boston & Maine R.R.*, 102 N.H. 179, 152 A.2d 606 (1959). 'There are, however, competing policies which result in imposing some limits on discovery . . ..' James, Civil Procedure § 6.8, at 200 (1965). The scope of discovery is generally limited to relevant material that is 'not privileged.' Wright & Miller, Federal Practice and Procedure: Civil § 2016 (1970). We have recognized in previous cases that the work product of a lawyer is privileged material. *E.g., Riddle Spring Realty Co. v. State*, 107 N.H. 271, 220 A.2d 751 (1966). This is necessary 'to preserve our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances (good cause or necessity), remain free from encroachments by his adversary.' Id. at 275, 220 A.2d at 756; accord, James, Civil Procedure § 6.9, at 204-05 (1965).

Reports obtained by a lawyer from his experts are almost always considered to be part of his work product. The reasons are clear. 'Reports from experts present peculiar problems. In the first place they are more likely than ordinary statements to reflect questions and lines of inquiry suggested by the

Page 360

lawyer. Moreover, the expert witness's very relationship to the case usually stems from the choice of the party and his attorney who hire such a witness to become associated with them in examining certain aspects of the case and advising what positions the party should take with regard to them. There seems to be fairly good reason, therefore, for treating these reports as part of the work product of the lawyer in most cases.' James, Civil Procedure § 6.9, at 207-08 (1965); see 4 Moore, Federal Practice 26.66 (2d rev. ed. 1972); Wright & Miller, supra § 2029.

Categorizing expert reports as work product, however, does not automatically insulate them from discovery. If 'relevant facts are unobtainable by other means, or are obtainable only under such conditions of hardship as would tend unfairly to prejudice the party seeking discovery, disclosure of work product may be compelled.' *Riddle*

Spring Realty Co. v. State, 107 N.H. 271, 275, 220 A.2d 751, 756 (1966);

[306 A.2d 791]*Muder v. Bentley*, 109 N.H. 71, 72, 242 A.2d 396 (1968). A party may thus discover as a matter of course the names of those persons his adversary expects to call as expert witnesses at trial, the substance of the facts and opinions about which they are expected to testify, and the basis for their opinions. See Riddle Spring Realty Co. v. State, supra; Fed.R.Civ.P. 26(b)(4)(A)(i); 4 Moore, Federal Practice 26.66(3) (2d rev. ed. 1972); Wright & Miller, supra § 2030. However, the facts known and opinions held by an expert not expected to testify at trial are discoverable ordinarily only 'upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.' Fed.R.Civ.P. 26(b)(4)(B); see *Humphreys Corp. v. Margo Lyn Co.*, 109 N.H. 498, 256 A.2d 149 (1969); 4 Moore, Federal Practice 26.66(4) (2d rev. ed. 1972); Wright & Miller, supra § 2032.

Since General Electric had not examined the refrigerator at the time it moved to produce the expert reports, its need for the reports and the unavailability of the type of information contained therein may not have been established. The defendant may have obtained information from discovery devices or other sources indicating the likelihood that the condition of the refrigerator had changed substantially from

the time it was inspected by plaintiffs' experts. Such a showing would have demonstrated that the factual and conclusory determinations of plaintiffs' experts probably are necessary to the defendant and otherwise unobtainable. Absent a showing to this effect, however, the order of the court should have limited discovery to the experts who are expected to testify at trial. The record does not reveal whether defendant made such a showing and there is no transcript of the proceedings. In this situation the appropriate procedure is to return the case to the superior court for whatever further proceedings justice may require consistent with this opinion. *Calderwood v. Calderwood*, 112 N.H. 355, 296 A.2d 910 (1972).

Remanded.

All concurred.

Page 678

139 N.H. 678 (N.H. 1995)

661 A.2d 1181

The STATE of New Hampshire

v.

Glendon P. DREWRY, Jr.

No. 93-487.

Supreme Court of New Hampshire.

June 30, 1995

Page 679

Jeffrey R. Howard, Atty. Gen. (Mary P. Castelli, Asst. Atty. Gen., on the brief and orally), for the State.

Shaheen, Cappiello, Stein & Gordon, Concord (Robert A. Stein, on the brief and orally

[661 A.2d 1182] and Michael J. Sheehan on the brief), for defendant.

Cathy J. Green, Manchester, by brief for the New Hampshire Ass'n of Criminal Defense Lawyers, as amicus curiae.

McSwiney, Semple, Bowers & Wise, Concord (Steven G. Brown on the brief), for the New Hampshire League of Investigators, Inc., as amicus curiae.

BROCK, Chief Justice.

The defendant, Glendon P. Drewry, Jr., is charged with multiple counts of negligent homicide arising from a car accident that resulted in the deaths of two people. In this interlocutory

Page 680

transfer, the defendant contends that the Superior Court (McHugh, J.) order that he disclose information regarding certain witnesses violates the work product doctrine and his rights to effective assistance of counsel and against self-incrimination under the State and Federal Constitutions. We affirm.

Based on a discovery request by the defendant, the State was ordered to provide the defendant with its entire investigative file. The State moved for reciprocal discovery pursuant to Superior Court Rule 99 seeking: (1) "[a] list of potential defense witnesses, with their respective addresses"; (2) "[s]tatements of the above witnesses, and/or reports of interviews with these witnesses"; and (3) "[a] list of any expert witnesses, along with their qualifications; reports or results of any physical, mental examinations, and results of any scientific experiments, tests or comparisons made by these witnesses." At the hearing on the State's motion for discovery, the State limited its request to individuals the defendant intended to call at trial.

The superior court ordered the defendant to provide the State with

a list of actual trial witnesses and their addresses, both lay witnesses and expert witnesses; with respect to lay witnesses, copies of any written statements signed by those witnesses that pertain solely to the witness's testimonial content; or statements taken by the defense not signed by the witness but containing the written recollection of the events of which he or she will testify; and with respect to expert witnesses, a report of their theories and opinions and the basis for them.

The court ordered the lay witness information to be given to the State fourteen days before trial and the expert information produced at least thirty days before trial. The court allowed an interlocutory transfer of its ruling.

I. Work Product Doctrine

The defendant argues that evidence is protected by the work product doctrine if it was prepared in anticipation of litigation by an attorney or at an attorney's direction and if it contains information acquired during preparation of the case for trial. He contends that each category of information the trial court ordered to be released to the State falls within the doctrine's protection. The defendant also argues that the evidence is protected by the work product doctrine because the State has failed to show "substantial need" for the materials or the inability "without undue hardship to obtain the substantial equivalent of the materials by other means," citing Superior Court Rule 35(b)(2). These arguments fail for the same reasons we today articulate in *State v. Chagnon*, 139 N.H. 671, 662

Page 681

A.2d 944 (1995). The defendant asserts that three types of evidence ordered to be disclosed are protected by the work product doctrine. We address only arguments that differ from those discussed in Chagnon.

The trial court's order requires the defendant to produce

a list of actual trial witnesses and their statements. The defendant argues that a witness list is work product because it expresses the defendant's theory and defenses. The trial court noted, however, that "[t]he disclosure of the trial witnesses' names and addresses is so fundamentally fair that defense counsel can offer no sound objections to it." Indeed, it was conceded at oral argument that it is the general practice in this State that the parties voluntarily turn over witness lists. *Cf. Barry v. Horne*, 117 N.H. 693, 695, 377 A.2d 623, 625 (1977) (affirming order requiring pretrial disclosure of trial witness names in civil case). Although this concession does not [661 A.2d 1183] serve to waive the issue, it does illustrate how minimal any intrusion into trial preparation such a disclosure would be. The trial court's decision to order the disclosure of the names of persons expected to testify at trial may or may not violate the work product doctrine. See Chagnon, 139 N.H. at ----, --- A.2d at ----. Regardless, the overriding necessity of the exchange of witness lists for the fair and efficient conduct of trials requires us to hold that witness lists are an exception to the work product doctrine and that they therefore must be disclosed upon request or order.

The defendant next argues that the order violates the work product doctrine by requiring the defendant to produce copies of any written statements signed by those witnesses and statements taken by the defense not signed by the witness but containing the written recollection of the events of which he or she will testify. The defendant argues that reports of interviews fall within the work product privilege pursuant to *State v. Dedrick*, 135 N.H. 502, 607 A.2d 127 (1992). In Dedrick, this court assumed that an attorney's handwritten "personal notes" were work product. Id. at 507-08, 607 A.2d at 130-31. The issue in that case, however, was waiver of the work product privilege, not the scope of the privilege, and therefore it offers little support for the defendant's position. In this case, the order requires production of only those parts of the reports of interviews that contain the substance of the witness's statement; "[a]nything in those reports that is in addition to the actual account of the incident by the witness such as the witness's appearance and demeanor when giving the statement or how defense counsel plans to introduce this evidence as part of his or her theory of defense can be excised prior to the statement being disclosed to the State." Under such an order, upon receiving a statement or report that is partially redacted, the party receiving the document has the right to ask the court to review the

Page 682

unredacted version in camera to verify that the omitted portions are protected by the work product doctrine. See Chagnon, 139 N.H. at ----, --- A.2d at ----.

Finally, the court's order requires production of expert reports of those expert witnesses the defendant intends to call at trial. The order states that "[i]n the case of expert witnesses, reports of their analys[e]s and conclusions will satisfy the disclosure requirement." The defendant argues that such disclosure would include work product because the defense "directed [the] expert to perform certain services with an eye toward trial."

This court has stated, in the civil context, that "[r]eports obtained by a lawyer from his experts are almost always considered to be part of his work product." *Willett v. General Elec. Co.*, 113 N.H. 358, 359, 306 A.2d 789, 790 (1973). We reasoned that

[r]eports from experts present peculiar problems. In the first place they are more likely than ordinary statements to reflect questions and lines of inquiry suggested by the lawyer. Moreover, the expert witness's very relationship to the case usually stems from the choice of the party and his attorney who hire such a witness to become associated with them in examining certain aspects of the case and advising what positions the party should take with regard to them. There seems to be fairly good reason, therefore, for treating these reports as part of the work product of the lawyer in most cases.

Id. at 359-60, 306 A.2d at 790 (quotation omitted).

Superior Court Rule 99, however, gives the trial court the authority in a criminal case to require the parties "to exchange ... statements of witnesses; any reports or results, or statements or conclusions relative thereto, of physical or mental examinations; or of scientific tests, experiments or comparisons; or any other reports or statements of experts." This portion of Rule 99 must be interpreted in a way so as to protect work product. Factual information in an expert's report is not privileged. A report that merely analyzes facts and renders an opinion as to what occurred without reflecting or discussing the theories, mental impressions, or litigation plans of the defense attorneys should not be considered work product. See 23 Am.Jur.2d Depositions & Discovery § 68

[661 A.2d 1184] (1983 & Supp.1995). Accordingly, we conclude that no part of the trial court's order violates the work product doctrine.

II. Right Against Self-Incrimination

The defendant next argues that the trial court's order violates his State and federal constitutional privileges against compelled

Page 683

self-incrimination. The New Hampshire Constitution provides that "[n]o subject shall ... be compelled to accuse

or furnish evidence against himself." N.H. CONST. pt. I, art. 15. The fifth amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The State constitutional privilege against self-incrimination is comparable in scope to the fifth amendment. *State v. Cormier*, 127 N.H. 253, 255, 499 A.2d 986, 988 (1985). We address the defendant's claim under the State Constitution first, see *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983), and cite federal law only as an aid to our analysis. *State v. Maya*, 126 N.H. 590, 594, 493 A.2d 1139, 1143 (1985). Because federal law is not more favorable to the defendant, we need not address his federal claim in this case. See id.; *State v. LaFountain*, 138 N.H. 225, 227, 636 A.2d 1028, 1029 (1994).

The defendant contends that the order violates his privilege against self-incrimination because it compels the production of information that will unconstitutionally lighten the prosecutor's burden of proving his guilt beyond a reasonable doubt. In making this argument, the defendant relies almost exclusively on *In re Misener*, 38 Cal.3d 543, 213 Cal.Rptr. 569, 698 P.2d 637 (1985). In Misener, the California Supreme Court rejected a statute that permitted "the prosecution in a criminal case to discover from the defendant or his counsel, following testimony on direct examination of defense witnesses other than the defendant, prior statements made by those witnesses." Id. at 570, 698 P.2d at 638. The court concluded that the statute was unconstitutional "because it violate[d] that aspect of the defendant's privilege against self-incrimination requiring the prosecution to carry the entire burden of proving the defendant's guilt." Id. After extensively reviewing the development of criminal discovery in California, the court rejected federal law to the contrary and based its decision solely on the California Constitution. The court reasoned:

By requiring the defendant to hand over evidence that will impeach his witnesses, [the statute] undeniably lightens the prosecution's burden. To the extent the prosecution gains information tending to negate a defense it is not investigating its own case, proving its own facts, or convincing the jury through its own resources.... [T]he privilege forbids compelled disclosures which could serve as a link in a chain of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness. The constitutional protection

does not end with the establishment of a prima facie case; it extends to the establishment of guilt, including absence of defense, excuse, or justification. There is no doubt that the evisceration of a defense "incriminates" the defendant.

Id. at 578, 698 P.2d at 646 (quotations and citations omitted); see *Scott v. State*, 519 P.2d 774, 775 (Alaska 1974) (decided under Alaska Constitution).

The holding in Misener was subsequently abrogated by an amendment to the California Constitution that provides for reciprocal discovery in criminal cases. See CAL. CONST. art. I, sec. 30(c). The California Supreme Court has since upheld the amendment against challenges that the amendment violates state and federal constitutional rights against self-incrimination. See *Izazaga v. Superior Court*, 54 Cal.3d 356, 285 Cal.Rptr. 231, 236-41, 815 P.2d 304, 309-14 (1991).

The United States Supreme Court has held that "the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial." *United States v. Nobles*, 422 U.S. 225, 234, 95 S.Ct. 2160,

[66] A.2d 1185] 2168, 45 L.Ed.2d 141 (1975). The Court reasoned that

the Fifth Amendment privilege against compulsory self-incrimination is an intimate and personal one, which protects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.... [T]he privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him.

Id. at 233, 95 S.Ct. at 2167 (quotations and citations omitted). The Court observed that "[t]he fact that ... statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him." Id. at 234, 95 S.Ct. at 2168; see *State v. Yates*, 111 Wash.2d 793, 765 P.2d 291, 295 (1988) (trial court's disclosure order does not violate defendant's right against compulsory self-incrimination because statements not made by the defendant). We too have noted the personal nature of the privilege. See *State v. Cote*, 95 N.H. 108, 111, 58 A.2d 749, 752 (1948) ("privilege against self-incrimination under [pt. I, art. 15] is strictly a personal one applicable to an individual holding his private records in a purely personal capacity").

In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court upheld the constitutionality of an alibi statute that required a defendant

to disclose prior to trial that he intends to rely on an alibi as a defense and to list the names of witnesses he intends to call at trial to prove the alibi. The Court reasoned that this did not require the defendant to say or

Page 685

testify to anything he would not otherwise say or testify to; it merely determined the time at which he would have to assert the matter:

At most, the [notice-of-alibi] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Id. at 85, 90 S.Ct. at 1898; see Super.Ct.R. 100.

The rationale of Williams has been held to apply equally to pretrial disclosure of more general information. In rejecting the defendant's argument that he was incriminating himself by providing pretrial a list of witnesses and their statements, the Indiana Supreme Court stated that "what was said in Williams with respect to alibi-witnesses is applicable to witnesses in general." *State ex rel. Keller v. Criminal Ct. of Marion Cty.*, 262 Ind. 420, 317 N.E.2d 433, 438 (1974).

The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Id. 317 N.E.2d at 438 (quotation omitted); accord *State v. Kills on Top*, 241 Mont. 378, 787 P.2d 336, 344 (1990); *Hobbs v. San Diego Mun. Court (People)*, 233 Cal.App.3d 670, 284 Cal.Rptr. 655, 664-65 (1991); *State v. Nelson*, 14 Wash.App. 658, 545 P.2d 36, 39 (1975). As observed by the authors of a study recommending "full and open discovery" in New Hampshire courts at the time Superior Court Rule 99 was enacted, pretrial exchange of information "would not infringe upon Fifth Amendment rights of defendants since it would not force testimony; rather, it would not allow the defendant to retain tactical advantages of timing which would be denied the prosecution." New Hampshire [661 A.2d 1186] Court System Standards and Goals 230 (1977).

The defendant's argument that disclosure would lighten the State's burden of proof has likewise been rejected. We agree with the Indiana Supreme Court that

Page 686

pre-trial discovery to the extent required in the case before us does not eliminate the proof beyond a reasonable doubt standard nor does it shift the burden of proof.... Pre-trial discovery merely regulates the timing of disclosures. Absent pre-trial discovery, a defendant can spring a surprise defense and witnesses in support thereof. The State's only recourse is to seek a continuance in order to meet this defense. The discovery procedure simply says that if a defendant chooses to employ a certain defense ... the State will not be surprised; the trial will not be delayed.

Keller, 317 N.E.2d at 437.

Because the trial court properly limited the scope of its order to those witnesses the defendant intended to call at trial, we hold that the trial court's order does not violate the defendant's State or federal right against self-incrimination.

III. Ineffective Assistance of Counsel

The State and Federal Constitutions guarantee the right to effective assistance of counsel. See N.H. CONST. pt. I, art. 15; U.S. CONST. amends. VI and XIV. The State Constitution provides at least as much protection as the Federal Constitution in this area. See *State v. Anaya*, 134 N.H. 346, 351, 592 A.2d 1142, 1145 (1991); cf. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). We consider the defendant's claim under the State Constitution first, see Ball, 124 N.H. at 231, 471 A.2d at 350, and use federal law only as an aid in our analysis. *State v. Killam*, 137 N.H. 155, 157, 626 A.2d 401, 403 (1993).

The defendant contends that "[o]rder[s] requiring production of investigators' and counsel's interviews will decrease the quality of representation given criminal defendants in this state in violation of defendant's state and federal rights [to] effective assistance of counsel." The defendant argues that "[d]efense counsel, in fear of unwittingly helping prepare the State's case, will not dig as zealously a[s] the law requires, possibly missing the basis for a defense."

This argument has been rejected by other courts. The Supreme Court of Washington stated:

We cannot conclude that the trial court's order [requiring defense counsel to produce for in camera review all alleged

work product] would have a chilling effect on either trial preparation by defense counsel or on the attorney-client relationship such as to deny defendant his right to counsel. To the contrary, we would expect diligent counsel to continue to interrogate potential prosecution witnesses whenever reasonably possible. Experienced members of

Page 687

the trial bar will and ordinarily should seek to ascertain what every witness will likely testify to at trial. Prudent practice, especially in a criminal case as serious as this one, calls for no less.

Yates, 765 P.2d at 295. The Supreme Judicial Court of Massachusetts noted that the policy behind the rules of criminal procedure in Massachusetts allowing for reciprocal discovery "is that the availability of statements of nonparty witnesses gathered by an adversary serves a truth-enhancing function that outweighs any resulting inconvenience or potential disincentive to lawyers who obtain and preserve such statements in written form." *Commonwealth v. Paszko*, 391 Mass. 164, 461 N.E.2d 222, 237 (1984) (citation omitted). The Paszko court concluded that

[t]his public policy determination is consistent with the constitutional right to effective assistance of counsel. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. Documents similar to those the defendant argues should be unavailable to the prosecution were made available to defense counsel for impeachment purposes. The defendant is not constitutionally entitled to a discovery system that operates only to his benefit.

[661 A.2d 1187] Id. (quotation omitted). Similarly, in Izazaga, the California Supreme Court stated that

a criminal defendant need disclose only those witnesses (and their statements) the defendant intends to call at trial. It is logical to assume that only those witnesses defense counsel deems helpful to the defense will appear on a defendant's witness list. The identity of damaging witnesses that the defense does not intend to call at trial need not be disclosed. Thus, there is nothing in [the discovery order] that would penalize exhaustive investigation or otherwise chill trial preparation of defense counsel such that criminal defendants would be denied the right to effective assistance of counsel under the Sixth Amendment.

Izazaga, 815 P.2d at 319.

The trial court's order in this case likewise limits discovery of statements to those witnesses the defendant intends to call at trial. Accordingly, we hold that the trial court's order does not deprive the

Page 688

defendant of effective assistance of counsel under the State or Federal Constitutions.

We have considered the other arguments raised by the defendant in this transfer, and find them to be meritless. See *Vogel v. Vogel*, 137 N.H. 321, 322, 627 A.2d 595, 596 (1993).

Affirmed and remanded.

All concurred.

Dartmouth Hitchcock Medical Center,

v.

Cross Country Travcorps, Inc., et al.

Civil No. 09-cv-160-JD

United States District Court, D. New Hampshire.

March 16, 2011

ORDER

JOSEPH A. DiCLERICO Jr., District Judge.

Cross Country Travcorps, Inc. ("Cross Country") moves to compel Dartmouth Hitchcock Medical Center ("DHMC") to produce certain letters written by DHMC's counsel to Dr. Sanders and Dr. Comi, who are DHMC employees and expert witnesses for DHMC.[1] DHMC objects, contending that the letters are protected by the attorney-client privilege, the work product privilege, and by Federal Rule of Civil Procedure 26(b)(4)(C). Cross Country failed to file a certification that it made a good faith effort to obtain concurrence from opposing counsel. See LR 7.1(c).

Discussion

In the course of deposing Dr. Sanders on January 1, 2011, counsel for Cross Country, Ronald Lajoie, found three letters from DHMC's counsel, Andrew Dunn, in Dr. Sanders's file. Lajoie asked Dunn to identify the letters. Dunn said that the first was a transmittal letter with directions to Dunn's office and a copy of Jean Clark's deposition transcript; the second was a copy of a letter to Dr. Comi, dated December 20, 2010, with exhibits from Clark's deposition; and the third was a report, dated January 7, 2011, summarizing Dunn's discussions with Dr. Sanders in preparation for his deposition. Dunn claimed that the three documents were protected from disclosure by privilege.

Cross Country moves to compel disclosure of all three documents. In support of its motion, Cross Country contends that neither Dr. Sanders nor Dr. Comi are retained experts, making Federal Rule of Civil Procedure 26(b)(4)(C) inapplicable. DHMC objects on the grounds that Dr. Sanders is a retained expert so that the documents are protected under Rule 26(b)(4)(C) and that the attorney-client and work product privileges protect the documents from disclosure.[2]

A. Dr. Sanders

Cross Country asserts that "Dr. Sanders is a non-retained expert for DHMC in this case, as he was employed by DHMC at the time it made its expert disclosure." DHMC responds that Dr. Sanders is a retained expert who was disclosed as such and provided a written report as required under Rule 26(a)(2). DHMC cites its expert disclosure and Dr. Sanders's report that were appended to Cross Country's previous motion to exclude and limit certain expert testimony.

In the current version, Federal Rule of Civil Procedure 26(b)(4) protects from discovery certain documents and "tangible things" that are prepared in anticipation of litigation or for trial by a retained expert or the party's attorney. Because Dr. Sanders is a retained expert, contrary to Cross Country's representation, it appears that Rule 26(b)(4) protects the documents at issue here.

B. Dr. Comi

Dr. Comi is an employee of DHMC and is not a retained expert. Therefore, apparently Rule 26(b)(4) does not apply to the letter addressed to him.[3] DHMC, however, asserts attorney-client and work product privilege.

Because the claims in this case are governed by New Hampshire law, the issue of privilege must be determined in accordance with New Hampshire law. Fed.R.Evid. 501. Under New Hampshire rules, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative...." N.H. Rules of Evid. 502(b). A representative of a client is "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client. *Id*. 502(a)(1).

DHMC asserts that as a non-retained expert witness and a doctor who is an employee of DHMC, Dr. Comi is a representative of DHMC within the meaning of Rule 502(b). DHMC further asserts that Dunn was acting as its attorney in sending the letter to Dr. Comi. DHMC also represents that the privilege has not been waived.

Cross Country did not address attorney-client privilege. Based on the arguments and evidence presented, DHMC has carried its burden of showing that the privilege applies to the letter sent to Dr. Comi. For the same reasons, even if Rule 26(b)(4) did not protect the documents sent to Dr. Sanders, the attorney-client privilege would apply to the documents, protecting them from disclosure.

Conclusion

For the foregoing reasons, the defendant's motion to compel (document no. 80) is denied.

SO ORDERED.

Notes:

[1] Dartmouth Hitchcock Medical Center ("DHMC") brought an action against Cross Country Travcorps, Inc., doing business as Cross Country Staffing, and their affiliates (referred to collectively as "Cross Country"), and CHG Medical Staffing, Inc., doing business as RN Network ("CHG"). DHMC's claims arise out of a medical negligence action, Aumand v. Dartmouth Hitchcock Medical Center, No. 06-cv-434-JL, brought by the daughter and husband of a patient, Katherine Coffey, who died following treatment at DHMC. In this case, DHMC seeks indemnification from Cross Country and contribution from Cross Country and CHG toward the damages paid in the Aumand case.

[2] At Dr. Sanders's deposition, Dunn stated that although he was asserting privilege as to all three documents, he did not care about the first document, the transmittal letter.

[3] The parties do not address what effect Rule 26(b)(4) would have here due to the fact that the letter to Dr. Comi was forwarded to Dr. Sanders, who is protected by Rule 26(b)(4).

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Steven E. Grill, ESQ
Devine Millimet & Branch PA
111 Amherst Street
PO Box 719
Manchester NH 03105-0719

Case Name: **Vention Medical Advanced Components, Inc. v Nikolaos Pappas, et al**
Case Number: **217-2014-CV-00604**

Enclosed please find a copy of the court's order of November 04, 2015 relative to:

ORDER

November 09, 2015

Tracy A. Uhrin
Clerk of Court

(484)

C: Jack S. White, ESQ; Tricia LaFlamme Albert, ESQ; Thomas J. Leonard, III; Arnold Rosenblatt, ESQ; Jonathan M. Shirley, ESQ; Owen Robert Graham, ESQ; Steven J. Grossman, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Vention Medical Advanced Components, Inc., d/b/a Advanced Polymers, a Vention Medical Company

v.

Nikoloas D. Pappas and Ascend Medical, Inc.

No. 2014-CV-00604

ORDER

The parties have submitted a Stipulation regarding a schedule for discovery. The Stipulation is APPROVED and the Stipulation is entered as an Order of this Court, with the following caveat.

The Stipulation recites that the parties "wish to stipulate to procedures for expert discovery based upon the current version of Rule 26 of the Federal Rules of Civil Procedure rather than RSA 516:29-B, II (b)". The Stipulation recites that the parties are not required to disclose drafts of any expert reports or critiques of or comments by counsel on such draft reports. Stipulation, ¶ 2(a).

The Court believes that the parties seek to limit their obligation to disclose information about their communications with their experts. While the Court has no objection to approving the Stipulation which will allow them to do so, the Court believes that New Hampshire law, and specifically RSA 516:29-b does not require parties to disclose drafts of expert reports or critiques of or comments by counsel on such reports.

The 1993 Amendments to Federal Rule of Civil Procedure 26 (b) (2) (B) broadly expanded discovery of communications between lawyers and testifying expert. The Rule

require disclosure of all "data or other information" relied upon by the expert. In interpreting the language "data or other information" contained in the 1993–2010 version of FRCP 26(a) (2) (B), the majority of federal courts applied a "bright line rule . . .: all documents considered by the testifying expert in forming his or her opinion, including attorney work product, are discoverable." Galvin v. Pepe, No. 09-CV-104-PB, 2010 WL 3092640, at *4 (D.N.H. August 5, 2010) (emphasis added); see also Elm Grove Coal Co. v. Dir., Office of Workers' Compensation Programs, 480 F.3d 278, 302 n. 24 (4th Cir. 2007); Regional Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 715 (6th Cir. 2006); In re Pioneer Hi–Bred Int'l, 238 F.3d 1370, 1375 (Fed. Cir. 2001). The bright line rule had not only been adopted by a majority of courts, it is been adopted by every Court of Appeal that has considered the question. South Yuba River Citizen's League v. National Marine Fisheries Service, 257 F.R.D. 607, 612 (E.D. Cal. 2009). "Courts adopting the bright line rule have reasoned that providing privileged material to the expert for him or her to consider in formulating an opinion affects a waiver of the work product privilege, by putting otherwise privileged material at issue in the case." Galvin, 2010 WL 30926240, at *5.

However, in 2011, FRCP 26 (a) (2) (B) was amended to provide that an expert witness must:

(ii) *identify facts or data* that the parties attorney provided and that the expert considered in forming the opinions to be expressed. (Emphasis supplied)

The purpose of the 2011 amendment was to specifically limit the expansive discovery allowed under the 1993 iteration of FRCP 26. The Advisory Committee Notes state: "the proposed amendments address the problems created by extensive change to

rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony."

The majority interpretation of the 1993 version of FRCP 26 was consistent with New Hampshire state discovery practice. See 4 R. Wiebusch, New Hampshire Civil Practice and Procedure §22.21[5] at 22-25 (2010) ("Except in the case of experts retained for and expected to testify at trial, a party cannot be required to disclose what the attorney or other representative has prepared in the course of work on the case . . .") (emphasis added).

New Hampshire RSA 516:29-b, enacted in 2004, requires parties to disclose a testifying expert's identity as well as "a written report signed by the witness." RSA 516:29-b, II. Significantly, the language of the statute is identical to the language of the 1993 iteration of FRCP 26. RSA 516:29-b II mandated disclosure of:

"the data or *other information* considered by the witness in forming the opinions.

When the legislature enacted RSA 516:29-b, the Judiciary Committee noted that the enactment of the statute would "not be a significant change in current practice." NEW HAMPSHIRE JUDICIARY COMMITTEE HEARING REPORT, S. 04-0362 (Feb. 9, 2004) (statement of Attorney Honigberg). Moreover, the statutory language "data or other information" was taken directly from the 1993 version of FRCP 26(a) (2) (B). Fed. R. Civ. P. 26(a) (2) (B) (2007); see id., ("the language is straight from Federal Rule 26") (statement of Attorney Honigberg).

However, the change in the federal rule occasionally worked a hardship on New Hampshire litigators Accordingly, RSA 516:29-b was amended in 2013, eff. January 1,

2014 to limit the amount of information that must be disclosed. Until 2014 RSA, 516:29-b II (b) required a party to disclose "the data or other information" an expert relied on. The 2013 amendment substituted "the **facts** or data" for "the data or **other information**".

The intent of the amendment was to make New Hampshire practice consistent with federal practice, and to avoid the harsh results which occurred when New Hampshire practitioners, particularly in the Business Court, assumed that the amended Federal Rule of Civil Procedure 26 was applicable to communications with experts. See generally Dartmouth College v. North Branch Construction, Inc. et al. No. 2009-CV-152 (August 6, 2012).

Therefore, while the Court approves the stipulation between the parties, to avoid misunderstanding, it notes that under the current statute the parties are not required to disclose drafts of any expert reports or critiques or comments by counsel on the reports. Indeed, the stipulation entered into by the parties arguably requires more information than the statute itself.

SO ORDERED.

11/4/15
DATE

Richard B. McNamara,
Presiding Justice

RBM/

145 N.H. 733 (2001)

THE STATE OF NEW HAMPSHIRE
v.
JASON FARRELL

No. 98-497.

Supreme Court of New Hampshire.

January 29, 2001.

734 *734 *Philip T. McLaughlin*, attorney general (*Charles T. Putnam*, senior assistant attorney general, on the brief and orally), for the State.

Twomey & Sisti Law Offices, of Chichester (*Paul Twomey* on the brief and orally), for the defendant.

BRODERICK, J.

The defendant, Jason Farrell, was certified as an adult at age sixteen, *see In re Farrell*, 142 N.H. 424, 702 A.2d 809 (1997), tried and convicted on one count of second degree murder, and sentenced to twenty-two to forty-four years in the New Hampshire State Prison. *See* RSA 630:1-b, I(b) (1996). On appeal, he argues that the Superior Court (*Smukler*, J.) erred in: (1) denying his motion to suppress statements he made to the police; (2) denying his motion to vacate acceptance of certification and transfer allowing him to be tried as an adult; (3) admitting evidence of prior bad acts without conducting the analysis required by New Hampshire Rule of Evidence 404(b); (4) refusing to allow his expert to disassemble the handgun at trial; (5) refusing his request to repoll the jury; and (6) permitting the prosecutor to encourage the jury to conduct experiments with the handgun during deliberations. The defendant also argues that there was insufficient evidence to find that he acted with extreme indifference to the value of human life. We reverse and remand.

On February 19, 1996, the defendant and his friend, a neighbor, went to a vacant lot in Concord to shoot a handgun that the defendant had taken from his home several days earlier. On their walk back to the friend's apartment, they met the victim, who joined them. Once at the apartment, the defendant's friend loaded two bullets into the handgun, and he and the defendant began "messing around" with it. The defendant apparently decided to play a joke on the victim in an effort to scare him. He asked his friend to count to ten and yell "bang" while he held the gun approximately two feet from the victim's face. He threatened to shoot the victim, saying, "I'm going to bust a cap in you." The victim replied, "Don't point that at me." The defendant allegedly took the gun off safety and again pointed it at the victim's face at close range. He asked his friend to count to ten, but before the count concluded, the gun discharged, critically wounding the victim, who died shortly thereafter.

When Officer Thomas arrived at the scene of the shooting, he was ordered to stay with the defendant. He testified that the juvenile was shaking and repeatedly said, "I didn't mean to do it." Thomas promptly told him not to say anything until
735 he was advised of his *735 rights. Thomas then drove the defendant to the Concord police station. Once there, Thomas took the defendant to the library, let him sit at a table, removed his handcuffs, and sat across from him.

About thirty minutes later, Detective Gagnon began interrogating the defendant. Gagnon explained the defendant's *Miranda* rights and gave him a copy of the simplified *Miranda* form used for juveniles. He then read each paragraph aloud and solicited the defendant's understanding. He specifically told the defendant that he might be charged as an adult and repeatedly advised him that he had a right to remain silent. Although the defendant exhibited some confusion about his right to counsel, he agreed to give a statement, and he signed the waiver portion of the *Miranda* form. Gagnon then interrogated him about the details of the shooting.

At one point, Gagnon left the room and discussed the defendant's statement with other investigating officers, including

Officer Cross. Cross, who had interviewed the defendant's friend, believed there were inconsistencies between the two stories. Gagnon took Cross to the library so Cross could interrogate the defendant. Cross' interrogation was confrontational and accusatory.

The defendant's father, William Farrell, who lived with the defendant, was home, but outside, at the time of the shooting. When informed of the shooting by a neighbor, he immediately approached two uniformed police officers and inquired about his son's whereabouts. They told him that his son had been taken downtown, but furnished no further details. Farrell proceeded to the police station, identified himself as the defendant's father to "the person at the window" and asked to see his son. Approximately ten minutes later, he repeated his request. No officer approached him, however, for fifteen to twenty minutes. While it is unclear exactly when Farrell arrived at the station and requested to see his son, it is clear that at some point his son was interrogated while Farrell waited at the station to consult with him.

At no time during the custody and interrogation of the defendant did the police make any affirmative effort to identify and notify his parents or any other interested adult with whom the defendant may have wished to consult. Further, the defendant was never told that his father was at the station requesting to consult with him. At the conclusion of the juvenile's interrogation, Gagnon located the defendant's father and led him to a room where they discussed what had occurred, including the fact that the victim had died. Finally, the father was taken to the library where his son was waiting. He then informed his son that the victim had expired.

736 *736

Prior to trial, the defendant moved to suppress his statements to the police arguing that they were obtained without a knowing, intelligent, and voluntary waiver of his *Miranda* rights. Specifically, he argued that the State failed to prove that he waived his constitutional rights in conformity with *State v. Benoit*, 126 N.H. 6, 490 A.2d 295 (1985). Ruling that the defendant was appropriately informed of his rights in comprehensible language and "was rational, emotionally composed, and understood the import of the situation and the rights involved," the trial court denied his motion.

On appeal, the defendant argues that his statements were obtained in violation of his right against self-incrimination under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Sixth Amendments to the United States Constitution. Specifically, he alleges that: (1) the police failed to identify and notify his parents immediately as required by RSA 594:15 (1986); (2) he did not fully understand his rights and, thus, could not knowingly and intelligently waive them; (3) the police failed to inform him that a presumption existed that he would be tried as an adult; and (4) his declarations made during Cross' interrogation effectively terminated his interview and required the police to secure a new *Miranda* waiver.

Because the Federal Constitution provides no greater protection to the defendant than the State Constitution, we address only the defendant's claims under the State Constitution and look to federal cases for guidance only. *See State v. Ball*, 124 N.H. 226, 231-33, 471 A.2d 347, 351-52 (1983). The New Hampshire Constitution provides that "[n]o subject shall be ... compelled to accuse or furnish evidence against himself." N.H. CONST. pt. I, art. 15. Accordingly, to overcome the presumption that a defendant would not normally forfeit this constitutional protection, the State must prove beyond a reasonable doubt that a defendant knowingly, intelligently, and voluntarily waived this right. *See State v. Gravel*, 135 N.H. 172, 178, 601 A.2d 678, 681 (1991). We will not reverse a trial court's finding on this issue "unless the manifest weight of the evidence, when viewed in the light most favorable to the State, is to the contrary." *State v. Gagnon*, 139 N.H. 175, 177, 651 A.2d 5, 7 (1994) (quotation omitted).

In *Benoit*, we addressed the capacity of juveniles to understand and waive their rights, concluding that special procedures are needed to protect them. *See Benoit*, 126 N.H. at 18-19, 490 A.2d at 303-04. We declined to adopt a
737 requirement, however, that an *737 interested adult be present at every custodial interrogation in order for a waiver to be effective, *see id.* at 16-17, 490 A.2d at 302-03, and agreed with the United States Supreme Court that the "totality-of-the-circumstances approach is adequate to determine whether there has been a waiver." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). We adopted a comprehensive, fifteen-factor test for trial courts to use in evaluating a juvenile's purported waiver:

> (1) the chronological age of the juvenile; (2) the apparent mental age of the juvenile; (3) the educational level of the juvenile; (4) the juvenile's physical condition; (5) the juvenile's previous dealings with the police or court appearances; (6) the extent of the explanation of rights; (7) the language of the warnings given; (8) the methods of interrogation; (9) the length of interrogation; (10) the length of time the juvenile was in custody; (11) whether the juvenile was held incommunicado; (12) whether the juvenile was afforded the opportunity to consult with an adult; (13) the juvenile's understanding of the offense charged; (14) whether the juvenile was warned of possible transfer to adult court; and (15) whether the juvenile later repudiated the statement.

Benoit, 126 N.H. at 15, 490 A.2d at 302. To find a valid waiver, the trial court must be persuaded by a sufficient number of favorable findings that a juvenile relinquished his right against self-incrimination in an intelligent, knowing, and voluntary manner. *See id.* at 19, 490 A.2d at 304.

A juvenile cannot be deemed to have knowingly waived his rights under any circumstances unless he is advised of the possibility of prosecution as an adult and the rights to be waived must be explained in a simplified fashion. *See id.* Our conclusions in *Benoit* were reached in the context of the existing statutory mandate that

> in *all* cases, juvenile or criminal, the law requires that the officer in charge of a police station to which an arrested person is brought *"shall immediately* secure" from the arrestee the name of a parent, near relative, friend or attorney with whom the person may desire to consult "and *immediately notify"* such person.

Id. (quoting RSA 594:15). The defendant asserts that the required notice was not given and that his *Miranda* waiver should be deemed invalid as a matter of law.

738 *738 The procedural requirements of RSA 594:15 are clearly intended for the benefit of the arrestee and violation of the statute constitutes a misdemeanor. *See* RSA 594:17 (1986). In the case of a juvenile, failure to comply with the statute may prevent the detained child from receiving valued assistance and counsel from a parent or guardian, near relative, friend, or attorney (parent or other adult), to whom he normally looks for guidance. Notifying a juvenile's parent or other adult must be understood to have some purpose, namely, to facilitate and aid a juvenile in seeking out a mature person with whom a juvenile may wish to consult. It is this notion that we sought to underscore in *Benoit* when expressly referencing RSA 594:15. *See* *Benoit*, 126 N.H. at 19, 490 A.2d at 304. Unfortunately, the facts of this case demonstrate that the statute is not always followed and, therefore, a juvenile may not always be given an opportunity to contact and confer with a parent or other adult. While we cannot say that a violation of the statute renders a juvenile waiver invalid as a matter of law as the defendant contends, it is apparent that additional safeguards are needed to ensure that juveniles are afforded *every* opportunity to notify and consult with their parent or other adult prior to waiving their *Miranda* rights.

Parents or other adults are in a position to help juveniles in understanding their rights, acting intelligently in waiving them, and otherwise remaining level-headed in the face of police interrogation. *See* *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *see also* *State v. Presha*, 748 A.2d 1108, 1119 (N.J. 2000). In an effort to preserve the requisite measure of special protection afforded juveniles, we hold that when RSA 594:15 is not followed, the absence of an opportunity to consult with an adult shall be given greater weight when assessing the totality of the circumstances surrounding a juvenile waiver. *See* *Benoit*, 126 N.H. at 15, 490 A.2d at 302.

In *Moran v Burbine*, 475 U.S. 412, 422-28 (1986), the United States Supreme Court held that an adult suspect does not have a right under *Miranda* to be advised by police that an attorney is attempting to reach him. While *Burbine* has been widely cited for the proposition that an adult suspect in custody need not be advised that his attorney is present, an issue we have never reached, we are unwilling to apply *Burbine* to cases involving juvenile suspects and their parents or legal guardians. "It is one thing to hold that an adult need not be advised of an attorney's presence in another room... [i]t is a far different thing to declare, as a matter of law, that a ... child need not be informed that his [parent] awaits in an
739 adjoining room." *In re Lucas F.*, 510 A.2d 270, 274 (Md. App. 1986). *739 We note that "all courts that have applied [the totality of the circumstances] standard to a case in which a parent was deliberately excluded [from consulting with his child] have suppressed the confession." *Presha*, 748 A.2d at 1119 (citations omitted) (Stein, J., concurring). Accordingly,

we also hold that when a parent or guardian arrives at a police station or other site of custodial detention and requests to see a child in custody, the police must: (1) immediately cease interrogating the juvenile; (2) notify him that his parent or guardian is present at the station; and (3) immediately allow the parent or guardian into the interrogation room.

In this case, the police failed to comply with the notice requirement of RSA 594:15. We express no opinion whether this failure alone tips the scale in favor of the defendant under a totality of the circumstances analysis. Here, the defendant's father fortuitously discovered his son was in custody and proceeded to the police station. While he was at the station requesting to see his son, the police did not cease the interrogation or inform the defendant that his father wanted to consult with him. Further, they made no effort to allow the defendant's father into the interrogation room immediately. In sum, the police effectively sequestered the defendant while obtaining his statements, and left his father waiting in the wings. Such conduct is inconsistent with the increased care required when a juvenile is detained and interrogated, and renders the defendant's *Miranda* waiver invalid. Accordingly, on remand for retrial the challenged statements to the police should be suppressed.

A certain amount of speculation is inherent in assessing the totality of the circumstances surrounding a juvenile's statements. Thus, as was true in *Benoit*, our holdings today "will not put an end to controversies surrounding a juvenile's waiver of constitutional rights." *Benoit*, 126 N.H. at 19, 490 A.2d at 304. Courts have recognized, however, that videotaping custodial interrogation may lessen the inherent speculation, avoid unwanted claims of coercion, and generally assist all parties in assessing what transpired during the interrogation. *See In re G.O.*, 727 N.E.2d 1003, 1014 (Ill. 2000); *Commonwealth v. Fryar*, 610 N.E.2d 903, 909-10 n.8 (Mass. 1993); *State v. James*, 858 P.2d 1012, 1017-18 (Utah App. 1993); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992); *see also* Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901 (1995). In light of the benefits associated with videotaping, we suggest that, to the extent possible, custodial interrogation of juveniles be videotaped.

740 *740 II

We also address the defendant's second, third, and fourth arguments as they involve errors that may likely arise on remand. *See State v. Frost*, 141 N.H. 493, 498, 686 A.2d 1172, 1176 (1996). We turn initially to the defendant's second argument that the trial court erred when it denied his motion to vacate his certification as an adult. Specifically, he argues that the prosecution's failure to disclose the laboratory notes of its handgun expert prior to his certification hearing violated his right to due process under the State and Federal Constitutions by denying him access to material evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Laurie*, 139 N.H. 325, 653 A.2d 549 (1995). The State counters that, in the context of a certification hearing, a juvenile defendant is not entitled to full discovery, but rather is entitled only to discover information essential to determine whether sufficient evidence exists to support an indictment. In addition, the State contends that it was not required to produce the notes, which commented on apparent abnormalities of the handgun, because they did not constitute favorable exculpatory evidence and were therefore not covered by any duty to disclose.

We first examine the defendant's assertions under the New Hampshire Constitution. *See State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983). Because Part I, Article 15 of the New Hampshire Constitution is at least as protective of the due process rights of the accused as the Federal Constitution, we address only his claims under the State Constitution and look to federal cases for guidance only. *See id.* at 233, 471 A.2d at 352.

When a criminal defendant alleges that his due process right has been violated by the State's failure to disclose material evidence, he must show that "favorable, exculpatory evidence [was] knowingly withheld by the prosecution." *Laurie*, 139 N.H. at 330, 653 A.2d at 552. After such a showing, "the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict." *Id.* Evidence is favorable "if it is material to guilt or to punishment." *Id.* at 528, 653 A.2d at 551 (citing *Brady v. Maryland*, 373 U.S. at 87).

We affirm the trial court's finding that the laboratory notes of the State's expert did not contain favorable evidence "which likely would be material to either guilt or punishment of the defendant in this case." Although the notes indicated an abnormal trigger pull measurement, the State's expert concluded that the gun "functioned normally during test firing,"

741 and was not "sensitive to jar-off." At *741 trial, his testimony corroborated his original conclusion. He stated that there existed "no significant mechanical malfunction with the firearm," and that "overall, it was in good condition." In addition, he reported that the safety functioned effectively and when set, prevented the gun from discharging. Significantly, the expert also indicated that substantial pressure was required to discharge the weapon, and that it was not, as the defendant contends, "capable of being discharged with the safety on" or "without the trigger even being pulled." Based upon the record, we conclude that the notes did not constitute favorable evidence.

Because we hold that the disputed material was not favorable, we need not decide whether the due process rights articulated in *Laurie* apply to juvenile certification hearings, which are properly regarded as investigatory rather than adjudicative proceedings. *See, e.g., In re Eduardo L.*, 136 N.H. 678, 687, 621 A.2d 923, 930 (1993).

III

We next turn to the defendant's argument that the trial court erred in admitting evidence of his conduct during the four days preceding the shooting. Specifically, the State moved to introduce evidence that the defendant: (1) removed a handgun from a locked container in his father's room on February 15, 1996, without his father's knowledge; (2) concealed the handgun and used it for target practice; (3) displayed the handgun to friends, demonstrating his knowledge of the handgun's operation; (4) took the handgun to a shopping mall and displayed it to friends; (5) pointed the handgun out a window while in the company of friends on February 17, 1996; and (6) pointed the handgun directly at the victim days before the shooting.

The trial court found that the defendant's conduct prior to the shooting was not evidence of "other crimes, wrongs, or acts" because it was "intertwined" with, and could not be separated from, the charged crime. Finding New Hampshire Rule of Evidence 404(b) inapplicable, the court admitted the evidence finding it relevant and highly probative under Rules 401, 402, and 403. On appeal, the defendant contends that the trial court erred in finding New Hampshire Rule of Evidence 404(b) inapplicable to the disputed evidence.

Absent a showing that the trial court's decision was "clearly untenable or unreasonable to the prejudice of [one's] case,"
742 we will not disturb a trial court's determination regarding the admissibility *742 of evidence. *State v. Stayman*, 138 N.H. 397, 402, 640 A.2d 771, 774 (1994) (quotation omitted). In this case, we find that the disputed evidence constituted extrinsic evidence of "other acts" which was subject to analysis under Rule 404(b). In this regard, the trial court erred in finding the Rule inapplicable. Should the disputed evidence be offered by the prosecution upon remand, the trial court should analyze its admissibility according to Rule 404(b).

IV

The defendant further contends that to demonstrate the internal mechanisms of the handgun, his expert should have been permitted to disassemble it at trial. In denying this opportunity to the defendant, the trial court reasoned that he would "have an adequate opportunity to make [his] case [that the handgun discharged accidentally] through ... testimony ... charts and ... photographs by the experts." On appeal, the defendant argues that, because the photographs were flawed and not sufficiently clear to permit the jury to see the damage to the handgun's internal mechanisms, the court's ruling prejudiced his defense in violation of Part I, Article 15 of the New Hampshire Constitution.

"In order to show a violation of due process under Part I, Article 15, a defendant must show that the [evidence] he was precluded from introducing would have been material and favorable to his defense in ways not merely cumulative of other evidence." *State v. Graf*, 143 N.H. 294, 301, 726 A.2d 1270, 1276 (1999) (quotation omitted). "Cumulative evidence is defined as additional evidence of the same kind to the same point." *State v. Davis*, 143 N.H. 8, 12, 718 A.2d 1202, 1204 (1999) (quotation omitted).

The defendant's expert testified at length that the handgun's hammer and sear had been altered which compromised the handgun's safety mechanism. In addition, he produced multiple photographs of the handgun's hammer and sear that he

took while disassembling it, as well as several photographs of "good" handgun parts. Moreover, he sketched two different illustrations of the existing flaws he observed within the handgun's safety mechanism, and one illustration of a properly functioning safety mechanism for comparison. Although the defendant argues on appeal that his expert's handgun photographs were not sufficiently clear to demonstrate the identified flaws to the jury, the defendant's expert only remarked upon the poor quality of one photograph.

Based solely upon the record before us, the demonstrative evidence sought to be admitted by the defendant was merely
743 *743 duplicative of other evidence already before the jury and the trial court properly excluded it. *See* *Graf*, 143 N.H. at 301, 726 A.2d at 1276.

Reversed and remanded.

BROCK, C.J., concurred; HORTON, J., retired, specially assigned under RSA 490:3, concurred.

Cumulative Evidence

All evidence must be relevant to be admissible.[i] Nonetheless, the trial court may exclude relevant evidence to avoid the "needless presentation of cumulative evidence."[ii]

Our Supreme Court has defined cumulative evidence "as additional evidence of the same kind to the same point."[iii]

In addition, courts have held expert testimony is cumulative evidence where: 1) two testifying experts have similar qualifications (i.e., one expert's "qualifications are not significantly greater than the other" expert's qualifications); 2) the two experts rely on the same evidence in forming their opinions; 3) the two experts' opinions are the same; and 4) the methodologies or analyses employed by the two experts are the same.[iv]

Under the Federal Rules of Evidence 403.8, expert testimony by one expert that reviewed a prior expert's report and testifies to the same findings (thus reiterating the prior expert's findings) was found to be cumulative because he "expressly adopt[ed] and incorporat[ed] the same findings and conclusions set forth in [the prior expert's] opinion"[v] However, in the same case the Court allowed the same second expert to "testify regarding those matters which are in addition to those set forth in Black's report" because such testimony was not the same, and therefore not cumulative under Rule 403.10[vi]

Rule 403 does not exclude all cumulative expert testimony, only 'needlessly' cumulative expert testimony.[vii] In other words, whether expert testimony is cumulative, and whether it is inadmissible as needlessly cumulative, are two entirely different issues. Our Supreme Court has specifically held that trial courts possess the ability to oversee the presentation of witnesses in a manner that will avoid unfair advantage to either party.[viii]

---

[i] N.H. R. Ev. 402.
[ii] N.H. R. Ev. 403. (emphasis added)
[iii] State v. Farrell, 145 N.H. 733, 742 (2001).
[iv] .Tran v. Toyota Motor Corp., 420 F.3d 1310, 1315 (11th Cir. 2005)
[v] Valley View, 2008 U.S. Dist. LEXIS 44181 (W.D. Ok 2008).
[vi] Valley View, 2008 U.S. Dist. LEXIS 44181 (W.D. Ok 2008
[vii] N.H. R. Ev. 403.
[viii] See Hilliard v. Beattie, 59 N.H. 462, 464 (1879) ("The number of witnesses called as experts . . . should not be so modified to give either party an unfair advantage.")

59 N.H. 462 (N.H. 1879)

Hilliard

v.

Beattie.

Supreme Court of New Hampshire

December, 1879

A verdict will not, ordinarily, be set aside on exception to the ruling of the court giving the right to open and close to either party, unless it appear that injustice has been done.

The court may limit the number of experts to be called as witnesses.

When the venue has been changed for the purpose of securing a fair trial, that purpose cannot be defeated by irrelevant statements and arguments of counsel addressed to the jury in relation to the change of venue

TRESPASS, for assault and battery. Plea, *son assault demesne*; replication *de injuria*, on which issue was joined. The general issue was not pleaded. The defendant claimed the right to open and close; but the court ruled that although no plea of the general issue had been actually filed, it must be regarded as filed, the special plea not having been filed within the time prescribed by the rules of court, and, against the defendant's exception, gave the open and close to the plaintiff.

Page 463

One King, a witness called by the plaintiff, among other things testified that within a day or two after the alleged assault he gave a written statement to one of the defendant's counsel. It was claimed that this testimony was not true, and, subject to the defendant's exception, the court allowed one Henry Hilliard to testify that he was present and saw the statement of King taken down by the counsel.

The court limited the number of experts to three on each side. The plaintiff called three witnesses as experts. He then called one Davis, a physician of twelve years' practice, and the court, without intending to change or modify its order relative to the number of expert witnesses, against the defendant's exception allowed the witness to describe the condition in which he found the plaintiff on examination, and that on such examination he felt with his hands the muscles of the plaintiff's legs and feet, and found those of the left leg softer than those of the right, and the left foot colder than the right. The defendant contended that the plaintiff's injuries were, to some extent, feigned; and as tending to show this, he called a witness to testify to statements of the plaintiff on a former trial, and, against the defendant's exception, the plaintiff was allowed to put in evidence all that he said on that occasion.

The defendant excepted to the exclusion of the testimony of one Childs, a physician, called as an expert, who had examined the plaintiff's pulse, and who took the rate of the pulse of several healthy men who were present when the plaintiff's pulse was taken, and who had been subjected to nearly the same conditions as to temperature as the plaintiff.

The action was originally commenced in the county of Coos, and on the defendants' motion

the venue was changed to the eastern district of the county of Grafton. In opening the case to the jury, the plaintiff's counsel said the suit was brought in Coos county, nearly a hundred miles north, and after it had been pending there nine years, because it was said the defendant could not get a fair trial among his acquaintances, "I am not saying for what reason"---the defendant's counsel, interrupting, objected to these remarks. The plaintiff's counsel replied, "It is important to know why we are here," and complained of the increased expense of trial caused by the change of venue. In his argument the defendant's counsel made some observations in justification of the defendant's application for a change of venue to a county where a trial might be had before a jury and in a community uninfluenced by local excitement or prejudice. The plaintiff's counsel, in his closing address to the jury, argued that it was the defendant's assault that created a feeling against him in Coos county, where the public were familiar with the transaction, and that if a state of feeling existed in that county unfavorable to the defendant, it was simply because his case was of that kind that no civilized being could help being prejudiced against it. To this the defendant objected.
Page 464

Further on in his argument the plaintiff's counsel said, "I submit that for putting us off, this delay, this dragging us into another county, we are entitled to compensation." To this the defendant objected. The court instructed the jury that the plaintiff was not entitled to damages for delay nor for the change of venue. Verdict for the plaintiff, and motion for a new trial.

Ray, Drew & Jordan, with whom were *Ladd* and *Blair & Burleigh*, to the point that the general issue not having been filed, and there being no issue except on the plea of *son assault demesne*, the defendant was entitled to the opening and close, cited *Dodge v. Morse*, 3 N.H. 232; *Seavy v. Dearborn*, 19 N.H. 351; *Belknap v. Wendell*, 21 N.H. 175, 181, 182; *Thurston v. Kennett*, 22 N.H. 151, 158; 159; *Chase v. Deming*, 42 N.H. 274; *Judge of Probate v. Stone*, 44 N.H. 593, 304; *Boardman v. Woodman*, 47 N.H. 120, 131, 132; *Hardy v. Merrill*, 56 N.H. 227; 1 Wat. Trespass, *ss.* 92, 243, 244; 1 Saund. Pl. and Ev. 103, 106; *Scott v. Hull*, 8 Conn. 303; *Davis v. Mason*, 4 Pick. 156, 159; *Jackson v. Heskett*, 2 Stark. 518; 1 Stark. Ev. 426; 1 Ch. Pl. 501; and, to the point that the statements in the opening and closing arguments of the plaintiffs were improper, *Tucker v. Henniker*, 41 N.H. 317.

A. P. Carpenter, Bingham & Mitchell, Fletcher, and Heywoods, for the plaintiff

STANLEY, J

As a general rule, it is desirable, in determining who shall have the opening and close, to follow the rules of pleading, and give that right to the party upon whom, by those rules, the burden of proof is placed; but this rule is not without its exceptions, and a verdict is not ordinarily set aside for a ruling of the court giving the right to open and close to either party, and is not in any case unless it appears that injustice has been done. There being an absence of any evidence that injustice was done by the ruling on this point, this exception is not sustained. *Boardman v. Woodman*, 47 N.H. 120, 143; *Hardy v. Merrill*, 56 N.H. 227, 234; *Schoff v. Laithe*, 58 N.H. 503; *Day v. Woodworth*, 13 How. 363, 369.

It does not appear that Henry Hilliard's testimony was material, nor that it was prejudical to the defendant's case. *State v. Clark*, 23 N.H. 429, 434; *Winkley v. Foye*, 28 N.H. 518---*S. C.*, 33 N.H. 171; *Center*, v. *Center*, 38 N.H. 318; *Winship v. Enfield*, 42 N.H. 197, 211; *Boyce v. Cheshire*

R. R., 42 N.H. 97.

The number of witnesses called, as experts may be limited by a special order, which should not be so modified as to give either party an unfair advantage.

The admissibility of the plaintiff's testimony on a former trial, stands on the same ground as his statements on a former occasion. They are both admissible to contradict him, but in such cases it is

Page 465

his right to have the whole statement relating to the same subjectmatter, so that the connection may be seen and understood, and thus the jury be able to give the proper effect to the contradiction.

The testimony of Childs was upon a collateral question, and it was for the court to determine whether any evidence should be received on that question, and to what extent the inquiry should be carried.

The exceptions to the remarks of the plaintiff's counsel in the opening statement are sustained. The objectionable remarks in the opening were upon a point not in issue, upon which evidence was not admissible, and about which comments were improper, and they were of a character to prejudice the jury against the defendant. So with the remarks in the closing argument to which exception was taken. They were not warranted by the evidence, and were upon a point which was not in any aspect of the case material. Why the venue was changed, and whether for sufficient reasons or not, was not in issue, and the subject was wrongfully presented for the consideration of the jury. The defendant was entitled to a fair and impartial trial, and to the verdict of the jury upon evidence relevant and competent to prove the issues presented. It was the right of counsel in the closing argument to comment upon the evidence received on the trial, to criticise the character, conduct, appearance, motives, and testimony of the witnesses, so far as they had appeared and were relevant to the issue, and this field was broad enough. It is held to be the duty of the court to check any departure from the evidence, and to stop counsel when they introduce irrevelant matters or facts not supported by the evidence; and if objection is made it is error to permit it, and a new trial will be granted. Proffatt Jury Trial, *s.* 250.

The remarks objected to were calculated to withdraw the attention of the jury from the true issue, to excite in their minds a prejudice against the defendant which was not based on the evidence, and, if they had the slightest weight in the mind of a single juror, the defendant did not have that fair and impartial trial which was his right, and which it is the duty of courts to give. The verdict was not a true verdict, according to the law and the evidence given to the jury. *Tucker v. Henniker*, 41 N.H. 317; *State v. Foley*, 45 N.H. 466; *State v. Smith*, 75 N. Ca. 306; *Coble v. Coble* , 79 N. Ca. 589; *Ferguson v. The State*, 49 Ind. 33; *Hennies v. Vogel*, 66 Ill. 401; *Rolfe v. Rumford* , 66 Me. 564.

It is neither the duty nor the right of counsel to appeal to prejudices, just or unjust, against his adversary, outside the case he has to try. The fullest freedom of speech within the limits of the evidence should be accorded to counsel; but it is license, not freedom of speech, to travel outside the record, basing his argument on statements not supported by evidence, and appealing to prejudices which find no warrant in the case. *Brown v. Swineford*, 44 Wis. 282. The remarks to

which exception was taken were of this
Page 466

character. In his opening address to the jury, the plaintiff called their attention to the change of venue, and was arguing against the defendant upon the reason of his claiming that he could not have a fair trial among his acquaintances and neighbors, when he was interrupted by the defendant's objection. He then insisted upon the propriety of such an opening, and complained of the change of venue. If the wrong had stopped here, the verdict could not have been sustained. Enough was done in the opening to secure an unfair trial, and enough was afterwards done to accomplish the same result. By the plaintiff's opening, the defendant, in argument, was led into the natural mistake of justifying his application for a change of venue. The error of the defendant, in thus attempting to defend himself against the plaintiff's irrelevant and illegal attack, did not justify the repetition of that attack made in the plaintiff's closing argument. After the defendant had a second time objected to this course of proceeding, the plaintiff asked the jury to give him damages for the change of venue. This change, made for the purpose of giving the defendant a fair trial, was not only used to defeat that purpose, but was set up as a distinct ground of damages. The question is, whether the plaintiff can compel an abandonment of all effort to secure a fair trial.

In some cases there may be a just presumption of fact that the jury are not influenced by evidence or arguments which they are instructed to disregard. *Burnham v. Butler*, 58 N.H. 568; *Com v. Cunningham*, 104 Mass. 545, 547. In this case, such presumption would relieve the plaintiff from the consequences of his wrongful claim of damages for the change of venue, but not from the consequences of his reiterated argument that the state of feeling in Coos, on account of which the venue was changed, showed that he was entitled to damages for the alleged assault. On this point, the defendant's repeated objections were not sustained at the trial, and the state of things which made the change of venue necessary was allowed to have unlimited effect in making it nugatory. The ability and persistence of the plaintiff's exertions in that direction leave no just ground for a presumption that they were unsuccessful. To sustain this verdict would be to hold that the change of venue was rightfully used to prevent the fair trial it was made to secure, and that a change of venue is always legal cause for turning justice aside by influences which the change is intended to avoid.

Verdict set aide.

BINGHAM and SMITH, JJ., did not sit: the others concurred.

Document:Valley View Angus Ranch v. Duke Energy Field Servs., L...

Valley View Angus Ranch v. Duke Energy Field Servs., LP., 2008 U.S. Dist. LEXIS 44181

United States District Court for the Western District of Oklahoma

June 4, **2008**, Decided; June 4, **2008**, Filed

NO. CIV-04-191-D

Reporter

2008 U.S. Dist. LEXIS 44181 | 2008 WL 2329169

VALLEY VIEW ANGUS RANCH, an Oklahoma corporation, and OTIS CULPEPPER, Plaintiffs, vs. DUKE ENERGY FIELD SERVICES, LP., Defendant.

Subsequent History: Partial summary judgment granted by **Valley View** Angus Ranch, Inc. v. Duke Energy Field Servs., LP, **2008** U.S. Dist. LEXIS 55479 (**W.D**. Okla., July 22, **2008**) Affirmed by **Valley View** Angus Ranch, Inc. v. Duke Energy Field Servs., LP, 2010 U.S. App. LEXIS 24859 (10th Cir., Dec. 6, 2010)

Prior History: Valley View Angus Ranch v. Duke Energy Field Servs., LP, **2008** U.S. Dist. LEXIS 37459 (**W.D**. Okla., May 7, **2008**)

Core Terms

supplemental report, bioremediation, expert witness, remediation, parties, admissibility, cleanup, contamination, supplemental, deposition, leak, challenges, contends, soil, initial report, expert testimony, concludes, motions, expert report, calculation, disclosure, deadline, exhibits, days, expert opinion, cumulative, pollution, rebuttal, reliable, conclusions

Case Summary

Procedural Posture

The parties filed motions to exclude all or part of the testimony of the expert witnesses in the case. Claims of plaintiffs, a ranch and an individual, were based on alleged injury to property, including soil and groundwater, resulting from a leak in a gas pipeline operated by defendant pipeline operator. The case was on remand from the United States Court of Appeals for the Tenth Circuit.

Overview

The expert witnesses were to offer testimony regarding the nature and extent of soil and groundwater contamination resulting from the leak, the remedial actions taken, any need for additional remediation, and the associated costs. In addition, the parties engaged real estate appraisers to offer expert opinions regarding the leak's effect on the property's value. Although the motions focused primarily on an expert's qualifications to express a specific opinion or the reliability of that opinion, some motions raised challenges based on Fed. R. Civ. P. 26 or 37. To the extent that plaintiffs' objections to the initial report of the operator's main expert were not rendered moot by his subsequent reports, the court found those objections insufficient to warrant exclusion of the expert's testimony pursuant to Daubert or Fed. R. Civ. P. 26(a)(2). The court concluded that the expert had sufficient expertise to qualify him to offer an opinion that the process of bioremediation could enhance cleanup of contaminants, and that he recognized its operation regarding the property involved in the case. The operator was permitted to add another expert to testify as to the underlying processes.

Outcome

The motions of both parties were granted in part and denied in part. The defendant's first expert was permitted to testify regarding the process of bioremediation in general. But plaintiffs' motions were granted as to his qualifications to explain the underlying chemical and biological processes. The operator's motion to exclude an expert's report as cumulative was also granted in part. Plaintiffs were permitted time to depose an added witness.

▼ LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers
Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN1 Fed. R. Evid. 702 allows expert testimony if the witness is qualified by knowledge, skill experience, training, or education and the proposed testimony would be helpful to the trier of fact, and is based upon sufficient facts or data, is the product of

reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. Pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., a court must, prior to admitting expert testimony, determine that the proposed testimony satisfies the requirements of Fed. R. Evid. 702 in that it is reliable and relevant. To be reliable, the testimony or evidence must be based on "scientific" knowledge, which is defined as that which is grounded in the methods and procedures of science or derived by the scientific method. Although Daubert sets out certain non-exclusive factors to apply when considering scientific expert testimony, the court has broad discretion to determine the applicability of those factors. The required inquiry is flexible and does not necessarily mandate application of all factors announced in Daubert. Further, expert testimony may be based on technical, as opposed to scientific, knowledge. Fed. R. Evid. 702. *Shepardize* - Narrow by this Headnote

Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN2 According to Daubert, a trial court determining the admissibility of expert testimony should consider: 1) whether the theory or technique used by the expert can be or 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 of the technique or method; and 4) whether the theory or technique has obtained general acceptance within the scientific community. *Shepardize* - Narrow by this Headnote

Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Helpfulness

HN3 Fed. R. Evid. 702 requires that expert testimony be relevant to the issues presented. To be relevant, the opinion must be such that it will assist the trier of fact in understanding the evidence. *Shepardize* - Narrow by this Headnote

Evidence > Burdens of Proof > Allocation
Evidence > Burdens of Proof > Preponderance of Evidence
Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN4 The proponent of expert evidence carries the burden of establishing its admissibility by a preponderance of the evidence. To satisfy that burden, the proponent need not prove that the expert is indisputably correct or that the expert's theory is "generally accepted" in the scientific community. Instead, it must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts that satisfy Fed. R. Evid. 702's reliability requirements, by

establishing that the opinion has been developed in a scientifically sound and methodologically reliable fashion. *Shepardize* - Narrow by this Headnote

Evidence > ... > Examination > Cross-Examinations > Scope
Evidence > Admissibility > Expert Witnesses

HN5 Where an opposing party asserts perceived weaknesses in an expert's opinion, the testimony is nevertheless admissible and should instead be the subject of cross-examination. In such cases, the burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion. *Shepardize* - Narrow by this Headnote

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN6 An expert's supplemental disclosures are governed by Fed. R. Civ. P. 26(e)(1), which references Fed. R. Civ. P. 26(a)(3) which, in turn, requires supplemental disclosures no later than 30 days before trial. *Shepardize* - Narrow by this Headnote

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN7 Pursuant to Daubert, a court must determine whether an expert witness is qualified to express an opinion on the subject matter of his testimony. An expert may be qualified as an expert by knowledge, skill, experience, training, or education. Fed. R. Evid. 702. *Shepardize* - Narrow by this Headnote

Evidence > ... > Hearsay > Exceptions > General Overview
Evidence > Admissibility > Expert Witnesses

HN8 An expert may testify about the underlying basis for his opinion, even if that basis consists of hearsay evidence, if it is evidence typically relied upon by experts in the field. Indeed, the **view** of the Tenth Circuit has been that when an expert testifies about such a statement, it is offered not for the truth of the statement but to show how the expert arrived at the opinion, and therefore is not considered hearsay. *Shepardize* - Narrow by this Headnote

Evidence > ... > Statements as Evidence > Hearsay > General Overview
Evidence > Admissibility > Expert Witnesses

HN9 Fed. R. Evid. 703 allows an expert witness to base his testimony upon facts or data that are hearsay, provided that those facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. The United States Court of Appeals for the Tenth Circuit has interpreted Rule 703 as allowing an expert to reveal the basis of his testimony during direct examination, even if this basis is hearsay, provided that the facts or data underlying his conclusions are of a type reasonably relied upon by others in his field of expertise. The hearsay is admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Jury Trials > Jury Instructions > Requests for Instructions
Evidence > Admissibility > Expert Witnesses

HN10 When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying Fed. R. Evid. 703 must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. In determining the appropriate course the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances. *Shepardize* - Narrow by this Headnote

Evidence > Types of Evidence > Demonstrative Evidence
> Foundational Requirements
Evidence > ... > Demonstrative Evidence > Photographs > Visual Formats
Evidence > ... > Testimony > Expert Witnesses > General Overview

HN11 Diagrams and other demonstrative exhibits may be presented by an expert witness who has not prepared the same so long as such exhibits are presented for illustrative or demonstrative purposes only, do not purport to depict what actually occurred in the case at issue, and the jury is expressly told that the depicted information is presented for the limited purpose of illustration. *Shepardize* - Narrow by this Headnote

Evidence > Admissibility > Expert Witnesses

HN12 In presenting his opinion, an expert cannot be permitted to define the law of the case. This rule is not, however, a per se bar on any expert testimony which happens to touch on the law; an expert may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. Expert testimony on legal issues crosses the line between the permissible and impermissible when it attempts to define the legal parameters within which the jury must exercise its fact-finding function. *Shepardize* - Narrow by this Headnote

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time
Evidence > Admissibility > Expert Witnesses

HN13 Relevant evidence may be excluded if its admission would result in needless presentation of cumulative evidence. Fed. R. Evid. 403. This rule applies to cumulative expert testimony. *Shepardize* - Narrow by this Headnote

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures
Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN14 Pursuant to Fed. R. Civ. P. 37, the court must exclude an expert witness who has not been timely disclosed under Fed. R. Civ. P. 26(a), if the failure to disclose the expert is without substantial justification, unless the failure is harmless. Fed. R. Civ. P. 37(c)(1). *Shepardize* - Narrow by this Headnote

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures
Evidence > Admissibility > Expert Witnesses

HN15 According to Smith v. Ford Motor Co., a court should consider four factors to decide if an expert witness may be added after the scheduled deadline: 1) the prejudice or surprise of the party against whom the witness would testify; 2) the ability of that party to cure the prejudice; 3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or other cases before the court; and 4) the bad faith or willfulness of the party in failing to comply with the court's scheduling order. *Shepardize* - Narrow by this Headnote

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN16 The Federal Rules of Civil Procedure contemplate the use of rebuttal experts, as an express deadline is provided for their disclosure. According to Rule 26, expert rebuttal reports must be submitted within 30 days of the other party's expert disclosure. Fed. R. Civ. P. 26(a)(2)(C)(ii). *Shepardize* - Narrow by this Headnote

Counsel: **[1]** For **Valley View** Angus Ranch Inc, an Oklahoma corporation, Otis Culpepper, an individual, Plaintiffs: Kenneth R Johnston, Wes Johnston ▾, Kenneth R Johnston & Associates ▾, Chickasha, **OK**.

For Duke Energy Field Services LP, a Colorado limted partnership, Defendant: Jayne Jarnigan Robertson ▾, Jayne Jarnigan Robertson ▾ Attorney at Law, Oklahoma City, **OK**.

Judges: TIMOTHY D. DEGIUSTI ▾, UNITED STATES DISTRICT JUDGE.

Opinion by: TIMOTHY D. DEGIUSTI ▾

Opinion

ORDER

Before the Court are the parties' motions to exclude all or part of the testimony of the expert witnesses who will testify in this case. Plaintiffs filed a motion [Doc. No. 48], a supplemental motion [Doc. No. 87], and a second supplemental motion [Doc. No. 167] to exclude the testimony of A. Joseph Reed. By a separate motion [Doc. No. 51], Plaintiffs challenge the testimony of Kim Allen. Defendant filed a motion [Doc. No. 45] and a supplemental motion [Doc. No. 168] to exclude the testimony of Jerry Black and Dr. Robert C. Knox. Defendant also moved to exclude the testimony of Jim Artman [Doc. No. 44]. In addition, Plaintiffs have filed a motion [Doc. No. 159] to strike David B. Vance as an expert witness.

I. Background:

Plaintiffs' claims are based on injury to property, **[2]** including soil and groundwater, resulting from a leak in a gas pipeline operated by Defendant. **Valley View** seeks damages based on the injury to the property as well as punitive damages; Culpepper seeks damages for his loss of the use and enjoyment of the property. Defendant does not dispute that the leak of hydrocarbons occurred. However, it contends that it took immediate corrective action, that Plaintiffs have exaggerated the extent of the damage and the work required to clean up the property, and that Plaintiffs failed to mitigate their damages. Defendant also contends that its conduct does not warrant consideration of punitive damages.

The parties' expert witnesses offer testimony regarding the nature and extent of the soil and groundwater contamination resulting from the leak, the remedial actions taken to date, the need or lack thereof for additional remediation, and the associated costs. In addition, the parties have engaged real estate appraisers to offer expert opinions regarding the effect of the leak on the value of the property.

The expert witnesses' opinions have been affected by the procedural history of this case. The original deadline for identifying expert witnesses **[3]** and submitting their reports was April 4, 2005. The parties complied with that deadline, timely deposed the experts, and filed motions in limine. Before rulings were issued on those motions, the Court granted Defendant's motion for summary judgment; in 2007, that ruling was reversed by the Tenth Circuit Court of Appeals, and the case was remanded. In the interim, no action was taken in this case. Following remand, the Court conducted a status conference. At the conference, the parties requested leave to supplement their expert witness reports after the experts reviewed and evaluated recent tests and data obtained since 2005. The Court agreed, and the parties then filed supplemental motions addressing the supplemental reports.

Although the motions focus primarily on the admissibility of expert testimony based on the expert's qualifications to express a specific opinion or the reliability of that opinion, some motions raise challenges based on Rules 26 or 37 of the Federal Rules of Civil Procedure. On May 29, **2008** the Court conducted a hearing on the motions. Having now reviewed the extensive briefs as well as the witnesses' reports and supplemental reports, and having considered the **[4]** testimony and argument presented at the hearing, the Court issues this order.

II. Rule 702 and *Daubert:*

The parties agree that ***HN1*** Rule 702 of the Federal Rules of Evidence allows expert testimony if the witness is qualified "by knowledge, skill experience, training, or education" and the proposed testimony would be helpful to the trier of fact, and is based upon sufficient facts or data, is the product of reliable principles and methods, and "the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Court must, prior to admitting expert testimony, determine that the proposed testimony satisfies the requirements of Rule 702 in that it is reliable and relevant.

To be reliable, the testimony or evidence must be based on "scientific" knowledge, which is defined as that which is grounded in the methods and procedures of science or "derived by the scientific method." *Daubert,* 509 U.S. at 590. Although *Daubert* sets out certain non-exclusive factors to apply when considering scientific expert testimony 1, the court has broad discretion to determine the applicability **[5]** of those factors. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The required inquiry is flexible and does not necessarily mandate application of all factors announced in *Daubert. Id.* at 149; *Goebel v. Denver and Rio Grande Western Railroad Co.,* 346 F.3d 987, 991-92 (10th Cir. 2003). Further, expert testimony may be based on technical, as opposed to scientific, knowledge. Fed. R. Evid. 702; *Kumho Tire,* 526 U.S. at 147.

HN3 Rule 702 also requires that the testimony be relevant to the issues presented. To be relevant, the opinion must be such that it will assist the trier of fact in understanding the evidence. *Kumho Tire*, 526 U.S. at 141.

HN4 The proponent of expert evidence carries the burden of establishing its admissibility by a preponderance of the evidence. *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); **[6]** *Hollander v. Sandoz Pharmaceuticals Corp.*, 95 F. Supp. 2d 1230, 1236 n.8 (**W.D**. Okla. 2000)(*citations omitted)*. To satisfy that burden, the proponent "need not prove that the expert is undisputably correct or that the expert's theory is 'generally accepted' in the scientific community." *Goebel*, 346 F.3d at 991, *quoting Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir.1999). Instead, it "must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts that satisfy Rule 702's reliability requirements," by establishing that the opinion has been developed in a scientifically sound and methodologically reliable fashion. *Id.*

III. Plaintiffs' motions to exclude the testimony of A. Joseph Reed:

In their three motions challenging the admissibility of A. Joseph Reed's testimony, Plaintiffs challenge his qualifications to offer certain opinions and argue that his supplemental report is procedurally deficient. Reed is a hydrologist and a certified geologist, with a bachelor's degree in environmental hydrology and a master's degree in watershed management. For nearly 40 years, he has been a consultant involved in the remediation **[7]** of contaminated soil and/or groundwater. In April 2005, Reed prepared an initial expert report; he also submitted a June 2005 supplemental report and a second supplemental report in April, **2008**.

A. Initial report and motion:

In general, Reed's initial report concluded that the damage to the soil and groundwater at issue in this case is capable of remediation, that Defendant had begun remediation work, and that the Plaintiffs' expert witnesses overestimated the work and associated costs required to clean up the property. In challenging the admissibility of the initial report and related testimony, Plaintiffs do not challenge Reed's qualifications, but instead argue that the report and opinion fail to satisfy *Daubert* because: 1) Reed does not propose a specific remediation plan; 2) his opinions regarding remediation are based on the expectation that Defendant will take action, and that expectation is too speculative to be admissible; 3) Reed's criticism of the remediation cost estimates of Plaintiffs' expert is improper because he did not prepare his own cost estimates; and 4) the expert report does not satisfy Fed. R. Civ. P. 26(a)(2) because Reed did not attach his trial exhibits.

Defendant **[8]** responded to each of these arguments in its response brief. At the May 29 hearing, these issues were not directly addressed by the parties. However, Plaintiffs have not withdrawn their objections, and their supplemental briefs indicate that they continue to assert these arguments.

To the extent that Plaintiffs' objections to Reed's initial report have not been rendered moot by his subsequent reports, the Court finds those objections insufficient to warrant exclusion of Reed's testimony pursuant to *Daubert* or Rule 26(a)(2). In challenging Reed's failure to submit a cleanup plan, Plaintiffs argue that this failure renders his opinions unreliable. However, Plaintiffs do not challenge Reed's methodology. The absence of a specific remediation plan does not render the opinions reflected in Reed's report unreliable; as Defendant points out, Reed's opinion is based on his **view** that, according to the information available prior to April 2005, a remediation plan was not required because Defendant had already initiated cleanup activities. Plaintiffs contend those actions were inadequate, and they submit expert opinions to support that contention. However, the fact that Plaintiffs challenge the **[9]** propriety of the cleanup efforts undertaken by Defendant at the time Reed's initial expert report was prepared does not compel a conclusion that Reed's contrary opinion is inadmissible. Similarly, the fact that Reed criticizes Plaintiffs' cleanup cost estimate and did not prepare his own cost estimate does not require exclusion of his report or his opinion; as Defendant points out, Reed relied instead on his belief that the additional costs outlined by Plaintiffs' expert were unnecessary because Defendant's actions were adequate. For the same reason, Reed's suggestion that Defendant would continue to engage in cleanup activities is not too speculative to warrant its exclusion under Rule 702.

The Court concludes that these challenges to Reed's initial report are directed at the weight and sufficiency of the report rather than its admissibility. ***HN5*** Where an opposing party asserts perceived weaknesses in an expert's opinion, the testimony is nevertheless admissible and should instead be the subject of cross-examination. *Hertz Corporation v. Gaddis-Walker Electric., Inc.*, 1997 U.S. App. LEXIS 27138, 1997 WL 606800 (10th Cir. 1997), *citing Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1482-83 (10th Cir. 1985). **[10]** In such cases, "the burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion." *Robinson v. Missouri Pacific RR Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994).

With respect to Plaintiffs' contention that Reed's report fails to comply with Fed. R. Civ. P. 26 (a)(2) because he does not attach copies of the actual trial exhibits he intends to introduce, the Court finds that contention does not warrant the exclusion of the report. As Defendant points out, Reed included a description of the exhibits he anticipated preparing for trial, and subsequently provided copies of exhibits with a supplemental report. The Scheduling Order in this case provided for the exchange of final trial exhibits, and it appears that the required exchange has taken place. The authorities cited by Plaintiffs do not compel a contrary result.

In accordance with the foregoing, the Plaintiffs' Motion in Limine [Doc. No. 48] is denied.

B. Supplemental and second supplemental reports and motions:

Following additional testing of the soil in May 2005, Reed submitted a supplemental report; he presented a copy of the two-page report to counsel for Plaintiffs **[11]** on the morning of his deposition. In that report, Reed addressed the recent test results and expanded his

conclusions to include the opinion that, in addition to the actions taken by Defendant, the cleanup of the property would be enhanced by the process of bioremediation. Also included in that report is a summary of the cleanup activities conducted by Defendant as of May 2005 and the costs incurred. Plaintiffs filed a supplemental motion [Doc. No. 87] seeking exclusion of this report because: 1) it was not timely submitted; 2) Reed is not qualified to opine on the subject of bioremediation; 3) copies of demonstrative exhibits submitted with the report cannot be introduced through Reed; and 4) Reed is not qualified to testify about the costs of cleanup.

Reed's second supplemental report was submitted in April **2008**, and concludes that the more recent soil test results show that the process of bioremediation has occurred. Plaintiffs have moved to exclude that report and the related testimony [Doc. No. 167], again arguing that Reed is not qualified to testify on the subject of bioremediation.

Plaintiffs' challenge to the timeliness of the supplemental report is based on the fact that it **[12]** was not provided until the day of Reed's deposition; they contend that the delay in providing it was prejudicial to Plaintiffs. In response, Defendant notes that Reed stated in his initial report that he would supplement his opinion when additional test results were available and argues that the supplemental report is designed to address those results. As Defendant also notes, ***HN6*** an expert's supplemental disclosures are governed by Fed. R. Civ. P. 26(e)(1), which references Fed. R. Civ. P. 26(a)(3) which, in turn, requires supplemental disclosures no later than 30 days before trial. At the time of Reed's June 5 deposition, the trial of this action was scheduled to commence on July 11, 2005, and the June 5 disclosure was more than 30 days in advance of trial. Defendant also contends that the supplemental report was not prejudicial to Plaintiffs because it consisted of only two pages; Reed also provided his entire file to Plaintiffs' counsel, and the deposition was recessed to give counsel an opportunity to review the supplemental report and file. Defendant also notes that Plaintiffs did not object or seek to reschedule the deposition 2, and did not file the supplemental motion until almost **[13]** two months after receiving the supplemental report.

Although the Court agrees that the supplemental report should have been provided to Plaintiffs earlier, the Court also agrees that any resulting prejudice to Plaintiffs could have been addressed in a request to postpone the deposition and extend discovery because of the belated submission of the report. Furthermore, Defendant is correct in noting that the supplemental report was submitted more than 30 days before the trial date. Therefore, Plaintiffs' request to exclude the report as untimely is denied.

The Court also rejects Plaintiffs' contention that Reed is not qualified to present testimony regarding the work performed by Defendant and the resulting costs. According to his testimony at the May 29 hearing, many of the costs incurred were based on work performed by his company, Arcadis, and he has knowledge regarding those costs. Although he is not an accountant and cannot offer testimony regarding accounting matters, he has experience **[14]** in numerous projects involving remediation and is familiar with the type of work involved as well as the related expenses. He cannot, of course, testify regarding all expenses incurred by Defendant, as he would not have a factual basis for such testimony. Instead, Defendant may introduce that testimony through an employee having knowledge of the

expenses incurred. The Court does not regard such testimony as expert testimony, and the parties have not suggested otherwise. Accordingly, the Plaintiffs' motion in this regard is denied in part and granted in part.

The primary focus of the Plaintiffs' objection to both the supplemental and second supplemental report is the argument that Reed is not qualified to opine on the subject of bioremediation. ***HN7*** Pursuant to *Daubert,* the Court must determine whether the expert witness is qualified to express an opinion on the subject matter of his testimony. 509 U.S. at 588-89. An expert may be qualified as an expert by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Plaintiffs challenge Reed's qualifications to testify about bioremediation because he admittedly does not have a degree in biochemistry or a related field. Because **[15]** expert qualifications are not, however, limited to education in the field but may be based on the witness's experience, Reed's lack of a degree in biochemistry does not necessarily render him unqualified to testify about bioremediation. The question is whether he has gained sufficient knowledge through his experience and training to satisfy the requirements of Fed. R. Evid. 702.

At the May 29 hearing, Reed testified that he has almost 40 years of experience as a consultant involved in the remediation or cleanup of contaminants in soil and water. His company, Arcadis, is comprised of employees having varying educational backgrounds. Reed testified that, although he does not have degrees in chemistry or biology and does not purport to be an expert in biochemistry, other Arcadis employees have formal education in these fields. According to Reed, when Arcadis consults on remediation projects, it utilizes the formal educational background and expertise of its staff in proposing and developing the projects. Reed also testified that Arcadis has provided consulting services on many projects in which soil or water has been contaminated by pollutants, including hydrocarbons. According to Reed, **[16]** he has personally been involved in a number of cleanup projects where the process of bioremediation successfully contributed to the cleanup of the soil or water. He identified approximately six projects in which he has personally observed the effects of bioremediation.

Reed also testified, however, that he does not consider himself qualified to opine in detail about the biochemistry involved in the process. Instead, he relies on colleagues who have the necessary educational background; he consults with his colleagues and obtains their input in this regard. Based on his personal experience, however, he considers himself knowledgeable in the process in general and qualified to explain that it does occur, the general manner in which it occurs, and the impact on remediation. At the hearing, Reed explained the general process of bioremediation as well as his opinion that, based on his observations and analysis of the tests performed on the property at issue, bioremediation is occurring at the subject property and has enhanced the removal of the pollutants in the soil and groundwater.

The Court concludes that, based on his experience as a consultant in the remediation of soil and groundwater **[17]** pollution, Reed has obtained sufficient expertise to qualify him to offer an opinion that the process of bioremediation can enhance cleanup of contaminants, and that he recognizes its operation regarding the property involved in this case. The testimony at the hearing offered by both Defendant and by Plaintiffs' own experts establishes that

bioremediation is a process recognized by experts in the field, although they may disagree regarding its impact as a general rule or as it applies to the facts of this case. As a result, the theory is sufficiently reliable to permit its presentation in this case.

Furthermore, Reed may rely to some extent on hearsay evidence in presenting his testimony. ***HN8*** An expert may testify about the underlying basis for his opinion, even if that basis consists of hearsay evidence, if it is evidence typically relied upon by experts in the field. "Indeed, the **view** of this circuit has been that when an expert testifies about such a statement, it is offered not for the truth of the statement but to show how the expert arrived at the opinion, and therefore is not considered hearsay." *Richie v. Mullin,* 417 F.3d 1117, 1125 (10th Cir. 2005), *citing Wilson v. Merrell Dow Pharm., Inc.,* 893 F.2d 1149, 1153 (10th Cir.1990). **[18]** According to the Court in *Wilson:*

> ***HN9*** Federal Rule of Evidence 703 allows an expert witness to base his testimony upon facts or data that are hearsay, provided that those facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' We have interpreted Rule 703 as allowing an expert to reveal the basis of his testimony during direct examination, even if this basis is hearsay, provided that the facts or data underlying his conclusions are of a type reasonably relied upon by others in his field of expertise. The hearsay is admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted.

Wilson, 893 F.2d at 1153, *citing United States v. Affleck,* 776 F.2d 1451, 1457-58 (10th Cir. 1985). To the extent that Reed's general opinion regarding bioremediation is based on the analysis of his colleagues and information they provided to him, his opinion is thus admissible so long as it satisfies Rule 703. Such information is admissible for the "purpose of assisting the jury in evaluating an expert's opinion," but "the underlying information is not **[19]** admissible simply because the opinion or inference is admitted." Advisory Committee Notes, Rule 703. Further, the notes provide that:

> ***HN10*** When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect.

Advisory Committee Notes, Rule 703. If the information is admitted "under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes." *Id.* "In determining the appropriate course the trial court should consider the probable effectiveness or lack of

effectiveness of a limiting instruction **[20]** under the particular circumstances." Advisory Committee Notes, Rule 703.

With respect to the admissibility of demonstrative exhibits consisting of diagrams reflecting the process of bioremediation, Plaintiffs' challenge to the admissibility of this evidence is based on the fact that Reed did not prepare these exhibits. However, in his testimony at the hearing, Reed stated that he obtained these diagrams from his colleagues and that they depict, in general, the process of bioremediation. He testified that they were not prepared for this litigation and are not designed to show what has occurred on Plaintiffs' property; instead, they are illustrative exhibits designed to assist the jury in understanding the bioremediation process.

HN11 Diagrams and other demonstrative exhibits may be presented by an expert witness who has not prepared the same so long as such exhibits are presented for illustrative or demonstrative purposes only, do not purport to depict what actually occurred in the case at issue, and the jury is expressly told that the depicted information is presented for the limited purpose of illustration. *See, e.g., Pandit v. American Honda Motor Co., Inc.*, 82 F.3d 376, 381 (10th Cir. 1996); **[21]** *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981). Based on the record, the Court concludes that Reed may utilize the diagrams as tools to illustrate the bioremediation process. The jury will be advised, upon request, that the diagrams do not purport to show what occurred in this case, but are presented only to generally explain and illustrate the process of bioremediation.

The Court concludes that, while Reed is qualified by his experience and direct involvement in remediation efforts which have included bioremediation, he may opine in general that such process occurs and that, based on his review of the test data, he believes the process has occurred in this case. He may utilize the diagrams at issue to generally explain the process. However, Reed is admittedly not qualified to explain in detail to the jury the chemical processes which take place during bioremediation and precisely how the process acts to eliminate hydrocarbons in the soil. That explanation requires chemical and biological expertise which he admits is beyond the scope of his knowledge. Accordingly, to the extent Plaintiffs' motions [Doc. Nos. 87 and 167] seek exclusion of any testimony by Reed regarding the process **[22]** of bioremediation in general, their motions are denied. To the extent that Plaintiffs challenge his qualifications to explain the underlying chemical and biological processes to the jury in detail, their motions are granted.

IV. Defendant's motions to exclude the testimony of Jerry Black and Dr. Robert Knox:

Plaintiffs have offered two witnesses, Jerry Black and Dr. Robert Knox, to provide expert testimony regarding the nature and extent of the damage caused to the soil and groundwater at the property as well as the work required to remediate the damage and the cost of that work. Defendant has filed a joint motion objecting to the initial reports of each expert [Doc. No. 45] and a supplemental motion [Doc. No. 168] again challenging the admissibility of the opinions reflected in the experts' recent supplemental reports.

A. Initial Motion:

1) Jerry Black:

In his initial report, Jerry Black concluded that the contamination of the soil and groundwater was more extensive than suggested by Defendant; he criticized Defendant's cleanup work as deficient. He also stated that, during its initial excavation of the area, Defendant failed to remove all contaminated soil and, in fact, re-filled some **[23]** of the excavation site with contaminated soil. As a result, he concluded that soil and groundwater continued to be contaminated and would require extensive remediation. He also opined that Defendant should have been aware of the leak long before its discovery and that it did not properly inspect the site of its pipeline gathering system. He further states that certain substances leaked into the soil pose a health risk to humans. He developed a cleanup proposal, listing all of the work which he believed would be required, and estimated the cost of the same.

Defendant's initial motion argues that Jerry Black's report and opinion should be excluded pursuant to Fed. R. Evid. 702 and *Daubert* because 1) Black is not qualified to opine concerning any aspect of gas pipeline gathering systems; 2) he is not qualified to offer the opinion that the pollution resulting from the leak is harmful to livestock and humans; 3) his proposed cleanup plan lacks sufficient detail to be reliable; 4) his opinions are inherently contradictory and thus unreliable; and 5) his opinion that Defendant violated Oklahoma Corporation Commission rules is an inadmissible legal conclusion.

Black testified that he is President **[24]** of Black & Associates, an environmental consulting firm which assists in evaluating soil and water pollution and proposing remedial actions. He has a bachelor's degree in zoology and a master's degree in environmental science. For a number of years, he was an inspector and trainer for the Oklahoma Water Resources Board; his duties included, *inter alia,* inspecting pipeline leaks from underground storage tanks. Thereafter, he formed his own company and has been a consultant for almost 30 years.

Defendant challenges that portion of Black's opinion in which he offers testimony regarding the gas pipeline gathering system operated by Defendant and his criticism of Defendant's failure to discover the leak at issue at an earlier date. Defendant contends that the operation of a gas gathering system differs from an underground storage tank and that Black lacks the experience or training required to offer an opinion regarding Defendant's gas gathering system. In response, Plaintiffs argue that, while employed by the Water Resources Board, Black inspected many pipelines.

During the May 29 hearing, Black testified regarding his experience. That testimony reflects that, while he has extensive experience **[25]** in matters related to pollution and the impact of leaks on groundwater, he does not have direct experience regarding the operation of gas gathering systems and the monitoring of related pipelines. Although he has inspected leaks from underground storage tanks, the maintenance and operation of such facilities differs from gas gathering systems. To the extent that he intends to offer an opinion regarding the latter, the Defendant's motion is granted.

Defendant also seeks to exclude the portion of his report in which he opines that the hydrocarbon leak on the property creates a hazard to humans. Because Black is not a toxicologist or medical expert, Defendant contends he is not qualified to offer that opinion. Furthermore, Defendant notes, Plaintiffs do not seek recovery of damages for any injury to humans or livestock; therefore, it contends that this opinion is not relevant.

During the May 29 hearing, Plaintiffs confirmed that they do not allege that any harm or injury to humans and/or livestock occurred as a result of the leak. However, they contend that this aspect of Black's opinion is relevant because the known carcinogenic impact of benzene may affect the value of the land to a potential **[26]** purchaser.

The Court concludes that experience or education in toxicology or a medical field is not required for a witness to generally state that benzene is a known carcinogen; its carcinogenic effect is well known to the public. However, Black is not qualified and cannot testify as to details regarding the scientific information underlying that known fact. Although Plaintiffs do not claim any harm to humans or livestock as a result of the leak at issue, to the extent that there is evidence that benzene remains in the groundwater, the general statement that it is a known carcinogen is admissible. Limited accordingly, the testimony will be permitted, and Defendant's motion is denied to that extent.

Defendant next contends that Black's cleanup plan lacks sufficient detail to be reliable and admissible. As Defendant points out, the original cleanup plan submitted as a part of Black's initial report consists of a one-page list of Black's recommended remedial actions, the cost of each item of work, and the total cost. Plaintiffs' response argues that the lack of detail does not render the plan inadmissible but goes to the weight of the evidence.

The Court agrees with Plaintiffs that any deficiencies **[27]** in the plan prepared by Black do not render it inadmissible under Fed. R. Evid. 702. As discussed in connection with Plaintiffs' challenge to portions of Reed's testimony, such deficiencies go to the weight of the evidence and should be the subject of cross-examination. *See Daubert,* 509 U.S. at 596; *Robinson,* 16 F.3d at 1090. Defendant's motion is denied as to this issue.

Defendant next contends that a portion of Black's testimony states an improper legal conclusion; specifically, Defendant challenges his statement that Defendant violated Oklahoma Corporation Commission ("OCC") rules by allowing the property at issue to become polluted. Plaintiffs contend that Black's reference to specific OCC rules which were allegedly violated is not a legal conclusion but is merely an observation of an obvious fact.

HN12 "In presenting his opinion, an expert cannot be permitted to define the law of the case." *Specht v. Jensen,* 853 F.2d 805, 810 (10th Cir.1988). "This rule is not, however, a *per se* **[28]** bar on any expert testimony which happens to touch on the law; an expert may be 'called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.'" *Smith v. Ingersoll-Rand Co.,* 214 F.3d 1235, 1246 (10th Cir.2000), *quoting Specht,* 853 F.2d at 809. Expert testimony on legal issues "crosses the line between the permissible and impermissible when it 'attempt[s] to define the legal parameters within which the jury must exercise its fact-finding function.'" *Smith,* 214 F.3d at 1246, *quoting Specht,* 853 F.2d at 809-10.

Black cannot testify in a manner that purports to instruct the jury that Defendant has violated rules or regulations; if alleged violations are at issue, they may be a proper subject for jury instruction. Because Black's testimony regarding OCC regulations was not specifically addressed during the May 29 hearing, it is not clear whether that testimony constitutes an impermissible legal opinion. The parties' arguments in this case suggest that there will be some evidence regarding the OCC and its role in cleanup operations; for example, Defendant has noted that its cleanup activities required OCC approval. To the **[29]** extent that the OCC regulations are designed to prohibit pollution resulting from gas pipeline leaks and the OCC must approve the cleanup of such pollution, the OCC regulations or requirements may be relevant in this case. However, the parties are admonished that the Court will not permit a witness to offer an opinion that, in effect, instructs the jury on a legal issue. If Black intends to offer this testimony at trial, Plaintiffs' counsel must provide advance notice to the Court of same so that this matter may be considered in the context of the trial testimony and a ruling made outside the presence of the jury.

2) Dr. Robert Knox:

Defendant does not challenge the qualifications of Dr. Knox; it argues that, because Dr. Knox's report and conclusions are almost identical to those of Black, his testimony should be excluded for the same reasons it challenges Black's testimony. Defendant's primary focus, however, is the contention that Dr. Knox's testimony is cumulative and must be excluded on that basis.

Dr. Knox is Director of Civil Engineering and Environmental Science at the University of Oklahoma. He is an environmental engineer and is also co-owner of a consulting firm, Surbec, which **[30]** is engaged in remediation of ground water contamination and has been involved in remediation projects throughout the United States. At the May 29 hearing, Dr. Knox testified that he has conducted extensive research in the areas of groundwater contamination and the movement of contaminants. The University of Oklahoma is the location of a national center designed to study these issues.

Dr. Knox's initial report expressly states that it adopts the findings and conclusions of Jerry Black. Dr. Knox testified that he relied on the report of Black in preparing his own report and opinion. According to Dr. Knox, Black completed soil tests and other field work; Dr. Knox reviewed the results of the field work and Black's expert report, and he agreed with Black's findings and conclusions in the initial report.

To the extent that Defendant challenges Black's report for lack of specificity or incompleteness, it also asserts those challenges to Dr. Knox's report because he adopts Black's findings and conclusions. Because the Court has determined that the alleged deficiencies in Black's report go to the weight of the opinion rather than its admissibility, the same ruling applies to Dr. Knox's opinion. **[31]** Thus, to that extent, the Defendant's motion must be denied.

However, the Court agrees that, to the extent Dr. Knox's report duplicates the report of Black, his report and related testimony should be excluded as cumulative. ***HN13*** Relevant evidence may be excluded if its admission would result in "needless presentation of

cumulative evidence." Fed. R. Evid. 403. This rule applies to cumulative expert testimony. *See United States v. Arney,* 248 F.3d 984, 990-91 (10th Cir. 2001); *Wilson v. Merrell Dow Pharmaceuticals, Inc.,* 893 F.2d 1149, 1151 (10th Cir. 1990).

After review and comparison of the reports prepared by Black and Dr. Knox, the Court concludes that they are cumulative to some extent. At the May 29 hearing, the Court asked Dr. Knox to focus his testimony on the portions of his report which presented conclusions and opinions which were not addressed by Black. His testimony reflects that Dr. Knox discussed some topics in his report which were not addressed by Black. Those are a discussion of surfactants and the related remediation process, a discussion of methods to remove contaminants in the subsurface, and the volumetric calculation showing the estimated rate of flow from the pipeline **[32]** at issue. Defendant suggests, however, that these first two topics were not addressed in his initial report or his supplemental report.

Plaintiffs argued at the May 29 hearing that the volumetric calculation included in Dr. Knox's report does not duplicate Black's opinion; they argue that this calculation is important to the jury's understanding of the extent to which the contamination allegedly spread and the resulting cost of remediation. Defendant challenges the relevance of this opinion on the grounds that the calculation does not take into account that the pipeline is a gas pipeline and, therefore, would not have been filled with fluid as Dr. Knox has assumed. Plaintiffs argue that Dr. Knox's report includes a discussion in Part 6 regarding the escape of fluid and the flow of subsurface fluids and that Black did not include these topics in his report. Plaintiffs also contend that the supplemental report of Dr. Knox contains this additional information.

The Court concludes that Defendant's motion to exclude cumulative testimony contained in Dr. Knox's report should be granted pursuant to Fed. R. Evid. 403, as Dr. Knox expressly adopts and incorporates the same findings and conclusions **[33]** set forth in Black's opinion. This does not, however, compel exclusion of all the opinions contained in Dr. Knox's reports 3; he may testify regarding those matters which are in addition to those set forth in Black's report. Plaintiffs are cautioned, however, to avoid any presentation of cumulative testimony as between Black and Dr. Knox.

B. Supplemental motion:

In response to the April **2008** supplemental reports of Black and Dr. Knox, Defendant filed a supplemental motion [Doc. No. 168] reiterating the arguments in the initial motion. With respect to Black's opinion, Defendant presents additional argument and authority regarding the soil samples on which he relied, contending that his samples do not cover a sufficient area to support his conclusion that contamination was extensive. Although Defendant's argument is persuasive, it does not present a sufficient basis for rendering the Black report inadmissible as unreliable. Instead, the deficiencies in his methodology **[34]** should be the subject of cross-examination, as they impact the weight of Black's testimony.

Defendant also challenges Black's supplemental report as containing calculation errors; these were addressed during Black's testimony at the May 29 hearing. The parties advised the

Court that Black conceded that his supplemental report contained errors; he corrected those errors, and the parties submitted the corrected report at the hearing. To the extent that Defendant seeks exclusion of the supplemental report based on Black's calculation errors, the motion must be denied. Black's errors do not render the report inadmissible, although they may impact the weight of his testimony. Defendant is free to point out those errors during Black's testimony at trial and cross-examine him as to the accuracy of his calculations.

In addressing the supplemental report of Dr. Knox, Defendant reiterates its arguments regarding the cumulative nature of his report and testimony. As noted above, the Court will not permit cumulative expert testimony; however, Dr. Knox can testify regarding those topics which do not simply reiterate the conclusions of Black.

Defendant's motion to exclude the initial report of Black **[35]** and Dr. Knox [Doc. No. 45] is granted in part and denied in part, as set forth above. With respect to the motion directed at their supplemental reports [Doc. No. 168], the same ruling applies. Defendant's motion seeking exclusion of Dr. Knox's report on the grounds that it is cumulative and must be excluded under Fed. R. Evid. 403 [Doc. Nos. 45 and 168] is also granted in part, as set forth above.

VI. The parties's motions to exclude the opinions of the real estate appraisers:

A. Plaintiffs' motion to exclude the report and testimony of Kim Allen:

Plaintiffs' additional motion [Doc. No. 51] seeks to exclude the opinion and testimony of Defendant's expert, Kim Allen, a real estate appraiser who will testify regarding the value of the property at issue before and after the pipeline leak. Plaintiffs argue that Allen's opinion is speculative and unreliable because it is based on the assumption that Defendant will clean up the property and because his method of valuation is based on temporary, rather than permanent, injury to the land.

Although Plaintiffs' motion is based on the contention that the injury in this case is permanent, their experts' testimony at the May 29 hearing reflects the **[36] view** that the injury is temporary in that remediation is anticipated. The issue is to what extent additional remediation is required and at what cost. Thus, to the extent that Plaintiffs contend Allen's calculation should be based on a permanent injury, their motion is denied. To the extent that the motion argues Allen improperly relied on the anticipation that Defendant would engage in cleanup activities, the motion is also denied. The testimony at the May 29 hearing shows that some activities have been undertaken; that Plaintiffs may disagree about the propriety or success of those efforts does not render Allen's belief speculative or unreliable. Any deficiencies in his methodology or calculations go to the weight of his testimony rather than to its admissibility, and Plaintiffs are free to explore the same in cross-examination at trial.

B. Defendant's motion to exclude the report and testimony of Jim Artman:

Defendant's initial motion [Doc. No. 44] sought exclusion of the report and testimony of Plaintiffs' real estate appraiser, Jim Artman. The motion reflects that, similar to the arguments asserted by Plaintiffs in their effort to exclude Kim Allen, Defendant's challenge to Artman's **[37]** testimony goes to its weight rather than to its admissibility. Defendant argues that he employed incorrect standards and did not utilize proper criteria in selecting properties as examples of comparable values. Defendant's supplemental motion regarding Artman is included in its supplemental motion challenging the testimony of Black and Dr. Knox [Doc. No. 168]. Its arguments in that motion also go to the weight of Artman's testimony. Defendant's motion and supplemental motion regarding Artman are thus denied.

During the May 29 hearing, the parties also advised the Court that Black's revised supplemental report has increased his estimate of the costs of remediation from approximately $ 470,000 to more than $ 750,000. Defendant suggested that this will impact the calculation of any damages for the harm done to the property.

The parties' arguments during the hearing reflect that any impact resulting from Black's revised calculations does not affect the admissibility of the real estate appraisers' testimony. Instead, any issue regarding recoverable damages for the injury to the property is a matter to be decided in connection with the jury instructions. Therefore, the parties's motions [Doc. **[38]** Nos. 44 and 51] are denied. To the extent this ruling impacts the jury instructions previously submitted by the parties, they are authorized to submit revised instructions on this issue only no later than Monday, June 9, **2008**.

V. Plaintiffs' motion to strike David B. Vance as an expert witness:

The final motion at issue is Plaintiffs' motion [Doc. No. 159] to strike David B. Vance as an expert witness on behalf of Defendant. Plaintiffs do not challenge Vance's qualifications or the substance of the expert report he prepared; instead, they contend that he must be excluded pursuant to Fed. R. Civ. P. 37 because he was not timely disclosed as an expert witness. Plaintiffs contend that his report, which contains an expert opinion on the process of bioremediation and its effect on the contaminants at issue in this case, is highly technical and beyond the expertise of their existing expert witnesses. Plaintiffs contend that, because Vance was not listed as an expert by the original April 4, 2005 deadline in the scheduling order, his disclosure was untimely.

Defendant named Vance as an additional witness and submitted his report on the April 4, **2008** deadline for submitting supplemental expert **[39]** reports. Vance is an associate of Arcadis, the company co-owned by Defendant's expert, A. Joseph Reed. During Reed's June, 2005 deposition, he identified Vance as the colleague who assisted Reed in reviewing the soil data with regard to considering whether bioremediation had occurred in this case. Reed testified that he consulted with Vance at the time. At the May 29 hearing, Reed also testified that it is his practice to rely on Vance and others affiliated with Arcadis to obtain their specific expertise with regard to applicable aspects of a remediation project.

Defendant states that Vance was not named as an expert by the April 4, 2005 deadline because, at that time, the issue of bioremediation had not been raised. When the May 2005 test results were reviewed by Reed, he determined that bioremediation could be an issue. However, Defendant states that it was not until Reed reviewed the test samples in March **2008** that he determined the evidence established that bioremediation had, in fact, occurred with respect to this property. During the May 29 hearing, Defendant's counsel stated in oral argument that Reed advised that, based on the results he reviewed, he believed it would be necessary **[40]** to have an additional expert with knowledge of biochemistry and related fields to explain how the test results reflect bioremediation has, in fact, occurred in this case. He recommended the addition of Vance, who has academic credentials in biochemistry and related fields as well as practical experience in bioremediation of hydrocarbon contamination, as an expert witness.

Defendant contends under these circumstances it was not aware of the need for an additional expert witness until after the recent test results were received, analyzed, and reviewed. Defendant notes that Vance was named by the April 4, **2008** deadline for supplemental expert reports and his report was submitted at that time. Therefore, his identity and his opinions were fully disclosed approximately 60 days in advance of the June 9, **2008** scheduled trial. Further, Defendant contends, Plaintiffs had ample opportunity to depose Vance and to seek leave of Court to name their own expert witness to respond to his opinions if their existing expert witnesses were not qualified to do so. Finally, Defendant states that Plaintiffs cannot have been completely surprised by his addition as a witness, as they have been aware of his **[41]** affiliation with Arcadis and his review of the 2005 data since that information was disclosed in Reed's June 2005 deposition.

HN14 Pursuant to Fed. R. Civ. P. 37, the Court must exclude an expert witness who has not been timely disclosed under Fed. R. Civ. P. 26(a), if the failure to disclose the expert is "without substantial justification," unless the failure is harmless. Fed. R. Civ. P. 37(c)(1). In this case, Defendant argues that substantial justification for the delay in naming Vance exists because the issue of bioremediation was not known to it in April 2005, the only deadline set by the Court for the disclosure of expert witnesses and their reports. Defendant contends that Vance was timely disclosed by the deadline set for supplemental expert reports.

Plaintiffs suggest that, in evaluating their motion, the Court should consider the factors set forth in *Smith v. Ford Motor Co.,* 626 F.2d 784 (10th Cir. 1980), a decision issued prior to the expert witness report revisions to Fed. R. Civ. P. 26. ***HN15*** According to *Smith,* the Court should consider four factors to decide if an expert witness may be added after the scheduled deadline: 1) the prejudice or surprise of the party against whom the **[42]** witness would testify; 2) the ability of that party to cure the prejudice; 3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or other cases before the court; and 4) the bad faith or willfulness of the party in failing to comply with the court's scheduling order. 626 F.2d at 797.

Applying these factors to this case, the Court concludes that Defendant has not acted in bad faith or willfully defied the court's previous orders. A review of the original 2005 expert reports reflects that the issue of bioremediation was not fully apparent in April 2005. Although

it was raised as an issue in Reed's June 2005 report and deposition, the importance of the issue was not apparent until recent testing. In the interim, no discovery or further action was required in this case because of the pendency of the appeal. The Court concludes that the necessity of expert testimony on this issue did not become known to Defendant until the **2008** test results were available.

Allowing Vance to testify would be prejudicial to Plaintiffs in the absence of an opportunity to depose him and, if necessary, to add a qualified expert to **[43]** respond to his testimony. However, that potential prejudice can readily be cured by allowing Plaintiffs time to depose Vance and additional time to name their own expert witness on this subject, if desired.

This is not a case in which Defendant is attempting at trial to call a previously undisclosed witness, as contemplated by the factors mentioned in *Smith*. Rather, it is a case in which the passage of time has resulted in an issue becoming more important as the case developed. The addition of a new expert or experts will not significantly disrupt the Court's schedule, as the trial of this case can be rescheduled to permit the parties sufficient time to address this issue and prepare for trial.

Weighing the factors in light of the developments in this case, the Court concludes that Defendant has shown substantial justification for the delayed disclosure of Vance as an expert witness. The better practice would have been for Defendant to file a motion seeking leave of Court to add a new expert; however, given the unique circumstances of this case, the Court will permit the addition of the witness.

To avoid prejudice to the Plaintiffs, the Court directs Defendant to produce David Vance for **[44]** a deposition within 14 days of this Order. Plaintiffs shall have 14 days from the date of the completed deposition in which to name a new expert to respond to Vance's testimony and submit an expert report; if Plaintiffs elect to utilize one of their existing expert witnesses, they must notify Defendant of that decision and submit the report within the time period set forth above. Plaintiffs' bioremediation expert, if any, must be made available for deposition within 7 days of the submission of the expert's report. This case is hereby stricken from the June 9, **2008** trial docket, and will be rescheduled on the July, **2008** docket 4. Subject to these limitations, Plaintiffs' motion to strike Vance as an expert witness [Doc. No. 159] is denied.

Defendant has also advised the Plaintiffs and the Court of its intent to call Vance as a rebuttal expert witness to rebut the opinions set forth in the April 4, **2008** supplemental reports of Plaintiffs' experts, Black and Knox. A rebuttal report for that purpose has **[45]** been prepared by Vance, and a copy was provided to the Court at the May 29 hearing. During oral argument at the hearing, counsel for Defendant stated that, in their April **2008** supplemental reports, Dr. Knox and Black both opine that, since 2005, the groundwater contamination has spread into a larger area. Although Reed is a hydrologist, Defendant contends he does not have the expertise to respond to Dr. Knox's opinion regarding subsurface pollution transport issues which he offers to support the conclusion that the area of contamination is greater now than it was in 2005. Defendant contends Vance is qualified to opine on these subjects, and he has prepared and submitted a report to rebut the opinions of Plaintiffs' experts.

As the parties are aware, the Scheduling Order in this case did not list a deadline for the disclosure of expert rebuttal witnesses. ***HN16*** The Federal Rules of Civil Procedure contemplate the use of rebuttal experts, as an express deadline is provided for their disclosure. According to Rule 26, expert rebuttal reports must be submitted within 30 days of the other party's expert disclosure. Fed. R. Civ. P.26(a)(2)(C)(ii). To be timely, then, the rebuttal report prepared **[46]** by Vance must have been submitted no later than 30 days after the April 4 supplemental reports of Black and Dr. Knox. As Defendant points out, Vance could not have prepared a rebuttal to the supplemental reports until they were submitted. His report was submitted to Plaintiffs within 30 days of the receipt of the supplemental reports.

The Court concludes that, given the disclosure of new opinions in the supplemental reports and the fact that Defendant's current expert does not have the expertise to respond to those opinions, Defendant may utilize Vance as a rebuttal expert. The Court further finds that the rebuttal expert report of Vance was timely prepared and submitted to Plaintiffs. Therefore, he will be permitted to testify in rebuttal to the new information set forth in the supplemental reports of Black and Dr. Knox.

VI. Conclusion:

For the foregoing reasons, the parties' motions challenging the admissibility of the respective expert witnesses are granted in part and denied in part. This case is stricken from the June 9, **2008** trial docket, to be rescheduled as soon as possible after the completion of the deposition of David Vance, the Plaintiffs' subsequent disclosure of an expert **[47]** witness and accompanying report in response to the opinion of Vance, and the completion of the deposition of that expert witness by Defendant.

If, after the completion of the depositions of Vance and the expert witness who may be named by Plaintiffs, the parties desire to file motions in limine to exclude the testimony of those two expert witnesses, they may do so no later than 10 days from the completion of the deposition of Plaintiffs' expert.

IT IS SO ORDERED this 4th day of June, **2008**.

/s/ Timothy D. DeGiusti

TIMOTHY D. DEGIUSTI

UNITED STATES DISTRICT JUDGE

Footnotes

1 ***HN2*** *According to Daubert, the trial court should consider: 1) whether the theory or technique used by the expert can be or 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 of the technique or method; and 4) whether the theory or*

technique has obtained general acceptance within the scientific community. 509 U.S. at 593-94.

2 *The deposition was scheduled for the final day of discovery; however, Defendant notes that Plaintiffs did not seek an extension of time or discuss rescheduling the deposition at the time it was taken.*

3 *Although Knox's supplemental report was not attached to any of the briefing of the parties, it was submitted to the Court at the hearing, and the Court notes that it goes beyond the scope of Black's reports in severalways.*

4 *If issues arise in the completion of this schedule which are unforseen at this time and which require Court intervention, the case will likely be stricken from the July* ***2008*** *trial docket.*

Content Type: Cases

Terms: Valley View, 2008 U.S. Dist. LEXIS 44181 (W.D. Ok 2008)

Narrow By: -None-

Date and Time: Feb 29, 2016 11:23:08 a.m. EST

2010 WL 8484208 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.
Merrimack County

BLANCHARD POINTE CONDOMINIUM OWNERS ASSOCIATION,
v.
BOWERS LANDING OF MERRIMACK DEVELOPMENT GROUP, LLC a/k/a Blom Development Group, LLC and VMY Vitols Architects, Inc.

No. 217-2010-CV-05003.
December 13, 2010.

Order

Richard B. McNamara, Presiding Justice.

Defendant Blom Development Group LLC ("Blom") has moved to partially exclude the testimony of Blanchard Point Condominium Owner's Association ("Blanchard") for failure to provide its **expert** disclosure in a timely fashion. The facts do not appear to be in dispute; after **expert reports** had been exchanged and after the deposition of Blanchard's **expert** had been taken, it informed the Defendants that it intended to **supplement** its **expert report** with new information, and provided a **supplemental report**. Defendants objected on the ground that they had already expended the funds to respond to Blanchard's **expert report** and to depose Blanchard's **expert**. Both Defendants seek to bar the use of the new opinions of Blanchard's **expert**. The parties agree redeposition of Blanchard's **expert** can be accomplished without delaying the trial.

Excluding Blanchard's **expert** would be a drastic remedy, which would not lead to a result based on all the relevant evidence. Therefore, the Blom's Motion is DENIED, upon the following conditions: that Blanchard allow its **expert** to be redeposed and to pay the costs of 1) Blom's **expert's** review of Blanchard's **report**, 2) redeposition of its **expert** (including costs and attorneys fees) by Blom, and 3) Blom's expense for examination of the property. All fees which Blom seeks to shift to Blanchard must be reasonable and customary, and if not agreed to, may be submitted to the Court for review.

Defendant VMY Vitois Architects, Inc. ("VMY") moves to strike Blanchard's **expert** on essentially the same grounds. However, the Parties have represented that changes in Blanchard's **expert report** will not affect the decision on VMY's pending summary judgment motion, which the parties have agreed can be decided without reference to any new **expert** opinions. For that reason, VMY's Motion to Strike Plaintiff's **Expert** Witness is DENIED without prejudice.

SO ORDERED.

XX/XX/

DATE

<<signature>>

Richard B. McNamara,

Presiding Justice

RBM/

End of Document

151 N.H. 618
Supreme Court of New Hampshire.

Karen and Frank FIGLIOLI
v.
R.J. MOREAU COMPANIES, INC.

No. 2003-676.
|
Argued: Oct. 13, 2004.
|
Opinion Issued: Jan. 6, 2005.
|
Rehearing Denied Feb. 2, 2005.

Synopsis
Background: Homeowners, who were injured when deck of their house collapsed, brought action against home builder for breach of contract, breach of warranty, negligence, loss of consortium and a violation of the Consumer Protection Act (CPA). The Superior Court, Brennan, J., entered judgment for homeowners, and builder appealed.

Holdings: The Supreme Court, Dalianis, J., held that:

[1] homeowners were not entitled to enhanced compensatory damages; and

[2] general and vascular surgeon was not qualified to give **expert** opinion either on homeowner's neurological impairment or on her whole person impairment under medical guidelines based upon surgeon's own findings.

Reversed and remanded.

West Headnotes (19)

[1] **Appeal and Error**
⇐Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict

Appellate court will uphold a trial court's ruling on a motion for a directed verdict when the record supports the conclusion that the trial court did not commit an unsustainable exercise of discretion.

1 Cases that cite this headnote

[2] **Trial**
⇐Sufficiency to Warrant Recovery, or to Establish Cause of Action or Defense
Trial
⇐Hearing and Determination

A trial court may grant a motion for a directed verdict only if it determines, after considering the evidence and construing all inferences therefrom most favorably to the non-moving party, that no rational juror could conclude that the non-moving party is entitled to any relief.

2 Cases that cite this headnote

[3] **Trial**
⇐Effect of Burden of Proof
Trial
⇐Speculation or Conjecture; Choice of Probabilities or Theories

Plaintiffs may not avoid a directed verdict by presenting evidence that is merely conjectural in nature; rather, the plaintiffs must present sufficient evidence to satisfy the burden of proof such that a reasonable jury could find in their favor.

Cases that cite this headnote

[4] **Damages**
⇐Motive or Intent of Wrongdoer as Affecting Award

When an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced

compensatory damages, and these enhanced compensatory damages, sometimes called liberal compensatory damages, are awarded only in exceptional cases, and not even in every case involving an intentional tort.

8 Cases that cite this headnote

[5] **Damages**
Personal Injuries and Physical Suffering
Evidence
Nature, Condition, and Relation of Objects

Homeowners who were injured when deck of their house collapsed were not entitled to enhanced compensatory damages on their negligence and breach of contract claims against builder; homeowners' **expert** testified that the deck would have remained intact if it had been lag bolted, homeowners presented no evidence as to the reason their deck was not lag bolted except that the deck next door was not lag bolted either, and the theories propounded by homeowners' counsel were not supported by anything more than conjecture.

1 Cases that cite this headnote

[6] **Evidence**
Bodily and Mental Condition

General and vascular surgeon was not qualified to give **expert** opinion either on homeowner's neurological impairment or on her whole person impairment under medical guidelines based upon surgeon's own findings in negligence action brought against home builder by homeowner, who was injured when deck of house collapsed; surgeon offered no evidence supporting his qualifications to make neurological impairment assessment or to give whole person impairment rating using guidelines, surgeon testified that he had no neurological training or experience, and he testified he had never before used the guidelines.

Cases that cite this headnote

[7] **Evidence**
Bodily and Mental Condition

General and vascular surgeon was not qualified to give **expert** opinion either on homeowner's neurological impairment or on her whole person impairment under medical guidelines based upon surgeon's review of neuro-psychologist's **report** in negligence action brought against home builder by homeowner, who was injured when deck of house collapsed; surgeon had no neurological training or experience and had never before used the guidelines, and in essence, surgeon's reliance upon neuro-psychologist's **report** was merely a repetition of findings that neuro-psychologist had made, but was not permitted to disclose. Rules of Evid., Rule 703.

Cases that cite this headnote

[8] **Appeal and Error**
Competency of Witness

Appellate court will reverse a trial court's determination of **expert** qualification if appellate court finds it to be an unsustainable exercise of discretion.

Cases that cite this headnote

[9] **Evidence**
Knowledge, Experience, and Skill in General

Although a medical degree does not automatically qualify a witness to give an **expert** opinion on every conceivable medical question, neither does the lack of specialization in a particular medical field automatically disqualify a doctor from testifying as an **expert** in that field.

Cases that cite this headnote

[10] **Evidence**
Determination of Question of Competency

An individual witness' qualifications must be determined on a case-by-case basis, not by application of a per se rule of exclusion or inclusion.

Cases that cite this headnote

[11] **Evidence**
Sources of Data

The basis for **expert** testimony may be facts or data perceived by or made known to the **expert** at or before the hearing, and the facts or data need not be admissible in evidence. Rules of Evid., Rule 703.

Cases that cite this headnote

[12] **Evidence**
Hearsay or Evidence Otherwise Incompetent

While an **expert** may rely upon inadmissible evidence to form an **expert** opinion, the basis for the conclusion is assumed to lie in his or her special knowledge of such matters.

Cases that cite this headnote

[13] **Pretrial Procedure**
Failure to Comply; Sanctions

Vocational rehabilitation consultant should not have been allowed to testify as to subject matter disclosed in his **supplemental report**, detailing earnings lost based upon homeowner's hypothetical future career as a real estate agent, when consultant's **supplemental report** was submitted ten days after the discovery deadline had passed in negligence action brought against home builder by homeowner who was injured when deck of house collapsed; although builder was aware that evidence would be presented that homeowner had wanted to be real estate agent, builder was not aware until after close of discovery that this evidence would come from consultant and would include dollar value.

Cases that cite this headnote

[14] **Pretrial Procedure**
Facts Known and Opinions Held by **Experts**
Pretrial Procedure
Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness

A party is entitled to disclosure of an opposing party's **experts**, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions, and party's failure to supply this information should result in the exclusion of **expert** opinion testimony unless good cause is shown to excuse the failure to disclose.

3 Cases that cite this headnote

[15] **Appeal and Error**
Depositions, Affidavits, or Discovery
Appeal and Error
Rulings on Admissibility of Evidence in General

Appellate court reviews a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard, and to meet this standard, party must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case.

5 Cases that cite this headnote

[16] **Evidence**
Care, Skill, Competency, or Mental Condition

Evidence of other defects in construction of house should not have been introduced to prove that homeowner's mental ability was intact prior to deck of house collapsing and thereby injuring homeowner; home builder offered issue of window frames as example to illustrate that homeowner had difficulty understanding builder's explanation of why window frames appeared so small and did not raise issue as example of mistakenly identified defect, and as such, evidence of other correctly identified defects was irrelevant, and as there was no proof that homeowner discovered actual defects, evidence of actual defects did not tend to show her mental acuity.

Cases that cite this headnote

[17] **Appeal and Error**
Rulings on Admissibility of Evidence in General

Appellate court will not reverse a trial court's ruling on the admissibility of evidence absent an unsustainable exercise of discretion.

3 Cases that cite this headnote

[18] **Evidence**
Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

"Opening the door" occurs when one party introduces evidence that provides justification beyond mere relevance for an opponent's introduction of otherwise inadmissible evidence, and by means of this mechanism, a misleading advantage may be countered with previously suppressed or otherwise inadmissible evidence, but fact that door has been opened does not, by itself, permit all evidence to pass through.

Cases that cite this headnote

[19] **Evidence**
Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

When a party leaves the trier of fact with a false or misleading impression, the opposing party is entitled to counter with evidence to refute the impression created and cure the misleading advantage.

Cases that cite this headnote

Attorneys and Law Firms

****965 *619** Thomas Craig, P.A., of Manchester (Thomas Craig on the brief and orally), for the plaintiffs.

Devine, Millimet & Branch, P.A., of Manchester (Richard E. Mills and Danielle L. Pacik on the brief, and Mr. Mills orally), for the defendant.

Opinion

DALIANIS, J.

The defendant, R.J. Moreau Companies, Inc. (Moreau), appeals a jury verdict in the Superior Court (*Brennan*, J.) for the plaintiffs, Karen and Frank Figlioli. The plaintiffs were awarded compensation for personal injuries resulting from the collapse of a deck built by the defendant. The defendant contends the trial court erred by (1) allowing the plaintiffs to pursue a claim for enhanced compensatory damages, (2) denying the defendant's motion for directed verdict on the enhanced compensatory damages claim, (3) allowing the plaintiffs to proceed with a claim under the Consumer Protection Act (CPA), RSA ch. 358-A (1995 & Supp.2004), (4) allowing testimony by a general practice ***620** surgeon regarding Karen Figlioli's neurological impairment, (5) allowing testimony regarding Karen Figlioli's lost earning capacity as a real estate agent and (6) allowing the plaintiffs to introduce evidence of uncontested construction defects. We reverse and remand for a new trial on the issue of damages.

The general facts and procedural history of this case are as follows: The plaintiffs purchased a lot from the defendant on May 28, 1997, on which the defendant built them a custom home with a second floor deck. The plaintiffs were on this deck on August 27, 2000, when it collapsed. Both plaintiffs suffered injuries; Karen Figlioli's injuries were more severe than her husband's.

The deck had two sources of support. The first consisted of exterior supports which extended diagonally from the far corners of the deck to connect to the side of the house. The second consisted of the **966 points where the deck itself was attached to the house. After the collapse, an inspection revealed that the deck had been attached to the house with nails. It is uncontested that the deck should have been attached with lag bolts. The carpenter who built the deck, one of the defendant's employees, testified at trial that he forgot to put the lag bolts in the deck. This was the only evidence offered as to why there were no lag bolts in the plaintiffs' deck, although the defendant also offered evidence that an examination of all of the second story decks the defendant had built revealed only one other deck lacking lag bolts: a deck attached to the house next door to the plaintiffs' residence.

The plaintiffs filed a lawsuit against the defendant alleging breach of contract, breach of warranty, negligence, loss of consortium and a violation of the CPA, arising from the collapse of the deck and from other defects in the home. Prior to trial the parties settled all of the claims relating to property damage from the construction defects.

The plaintiffs continued their action for damages and economic loss due to the bodily injuries sustained in the collapse. They sought summary judgment on the issue of liability, which was granted on January 8, 2003. The remaining issues went to trial.

We first address the enhanced compensatory damages claim and the CPA claim. The defendant argues that the trial court should have ruled that both claims were procedurally barred, and therefore the plaintiffs should not have been allowed to proceed to trial on those claims. With respect to the CPA claim, this issue is moot, because at the close of the plaintiffs' case, the trial court granted a directed verdict for the defendant on the CPA claim, and the plaintiffs did not appeal the ruling. With respect *621 to the enhanced damages claim, we conclude that the trial court erred by not granting the defendant's motion for a directed verdict on the merits of this claim. Therefore, we need not address the argument regarding whether it was procedurally barred.

[1] [2] [3] We will uphold a trial court's ruling on a motion for a directed verdict when the record supports the conclusion that the trial court did not commit an unsustainable exercise of discretion. *Dillman v. N.H. College*, 150 N.H. 431, 434, 838 A.2d 1274 (2003). A trial court may grant a motion for a directed verdict only if it determines, after considering the evidence and construing all inferences therefrom most favorably to the non-moving party, that no rational juror could conclude that the non-moving party is entitled to any relief. *Id.* However, the plaintiffs may not avoid a directed verdict by presenting evidence that is merely conjectural in nature. Rather, the plaintiffs must present sufficient evidence to satisfy the burden of proof such that a reasonable jury could find in their favor. *Vautour v. Body Masters Sports Indus.*, 147 N.H. 150, 153, 784 A.2d 1178 (2001).

[4] When an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages. *Crowley v. Global Realty, Inc.*, 124 N.H. 814, 818, 474 A.2d 1056 (1984). These enhanced compensatory damages, sometimes called liberal compensatory damages, see *Munson v. Raudonis*, 118 N.H. 474, 479, 387 A.2d 1174 (1978), are awarded only in exceptional cases, and not even in every case involving an intentional tort. *Id.*; *Johnsen v. Fernald*, 120 N.H. 440, 442, 416 A.2d 1367 (1980). We must examine the evidence presented at trial and determine whether a rational juror, construing all inferences most favorably to the plaintiffs, could have found evidence sufficient to **967 support a claim for enhanced compensatory damages.

The plaintiffs assert that the testimony of their **expert**, Kris Larsen, was sufficient to support a claim for enhanced compensatory damages. Larsen, a general contractor, testified that in his opinion there was "gross negligence in the deviation of the fastening of the deck to the structure which allowed for and created a very hazardous unsafe condition." He testified that the manner of constructing the deck was in "gross disregard for the safety of the people using the deck." Larsen also testified that the deck would have remained intact if it had been lag bolted.

Larsen, however, had never met the carpenter who built the deck, and he had no firsthand knowledge of the construction. The only evidence that was presented as to why the deck was not lag bolted was the testimony of the carpenter, Jon Latares. Latares testified that he had intended to *622 replace the nails with lag bolts before he finished construction, but that he forgot to do so.

[5] The plaintiffs argue that Latares' testimony was "simply not credible" and that "[a]rguably, it was not his forgetfulness but rather his usual practice that created this situation." Construing all of the evidence in the plaintiffs' favor, however, we find that no rational juror could conclude that the plaintiffs are entitled to relief on the claim for enhanced compensatory damages. In order to defeat the motion for a directed verdict, the plaintiffs were required to present evidence of wanton, malicious or oppressive conduct on the part of the defendant. The plaintiffs presented no evidence as to the reason their deck was not lag bolted except that the deck next door was not lag bolted either. The theories propounded by plaintiffs' counsel are not supported by anything more than conjecture.

In its denial of a directed verdict on the enhanced compensatory damages issue, the trial court relied upon *Schneider v. Plymouth State College*, 144 N.H. 458, 744 A.2d 101 (1999), finding little difference between the actions of the defendant college in Schneider and those of the defendant in this case. In Schneider, we upheld a verdict including enhanced compensatory damages because the defendant college failed "to investigate promptly and vigorously" allegations of sexual harassment. *Schneider*, 144 N.H. at 466, 744 A.2d 101. The defendant college had received multiple **reports** of sexual harassment from at least three professors at three different times, yet still failed to act. *Id.* at 460-61, 744 A.2d 101. The defendant college in Schneider repeatedly ignored **reports** from its own faculty that a student was being sexually harassed. The situation in Schneider is very different from this case, where the only evidence produced was that the defendant's employee forgot to lag bolt the deck.

The remaining issues concern events that took place at trial; we will address those issues that are likely to arise on remand. *Simpson v. Calivas*, 139 N.H. 1, 13, 650 A.2d 318 (1994).

[6] [7] The defendant next argues that the trial court erred by allowing Dr. Patrick Mahon to testify as to Karen Figlioli's neurological impairment and her whole person impairment, derived from the American Medical Association Guidelines (AMA Guidelines). Mahon is a general and vascular surgeon. He testified that general surgery is "a fairly broad area of surgery, ... complete management of trauma, abdominal surgery, endocrine surgery, head and neck surgery...." Vascular surgery "is the *623 surgery of the blood vessels, excluding the heart and excluding blood vessels in the brain...."

968 Mahon was hired by the plaintiffs to assess the consequences of the injury to Karen Figlioli's spleen, evaluate the other medical **reports, and determine her combined impairment assessment. He testified, using the AMA Guidelines, that Karen had a combined thirty-two percent whole person impairment, which he described as a measure of her decreased functioning as a person. Mahon testified that he had never used the AMA Guidelines prior to this case.

He was also asked to give his opinion on the extent of Karen's neurological impairment. Mahon is not a neurologist and claimed no expertise in the field of neurology, but he testified that Karen had a fourteen percent neurological impairment. The defendant argues that Mahon lacked the education and experience to qualify him as an **expert** in either of these matters. We agree.

[8] New Hampshire Rule of Evidence 702 states that an **expert** may be qualified on the basis of "knowledge, skill, experience, training, or education." *N.H.R.Ev.*702. We will reverse a trial court's determination of **expert** qualification if we find it to be an unsustainable exercise of discretion. *Baker Valley Lumber v. Ingersoll-Rand*, 148 N.H. 609, 612, 813 A.2d 409 (2002).

[9] [10] Although a medical degree does not automatically qualify a witness to give an opinion on every conceivable medical question, neither does the lack of specialization in a particular medical field automatically disqualify a doctor from testifying as an **expert** in that field. An individual witness's qualifications must be determined on a case-by-case basis, not by application of a per se rule of exclusion or inclusion. *Mankoski v. Briley*, 137 N.H. 308, 313, 627 A.2d 578 (1993).

We have allowed **experts** to testify about a field beyond their specific training when they have experience adequate to render them an **expert** in that field. In *Mankoski*, for example, the plaintiff's attorney made an adequate offer of proof that the **expert**, an orthopedic specialist, had medical training in the diagnosis of depression, had treated many patients with orthopedic problems who developed depression as a result of those problems, and was able to diagnose and treat depression. *Id.* at 311-12, 313, 627 A.2d 578. We ruled that the trial court erred by ruling the **expert** *per se* unqualified. *Id.* at 313, 627 A.2d 578. In *Hodgdon v. Frisbie Memorial Hospital*, we held it was not an unsustainable exercise of discretion for the trial court to qualify an ophthalmologist as an **expert** in emergency room care, when he testified that he instructed emergency room physicians in the care of *624 emergency ophthalmic conditions, and could

provide testimony as to what an emergency room physician is expected to do in a given situation. *Hodgdon v. Frisbie Mem. Hosp.*, 147 N.H. 286, 289-90, 786 A.2d 859 (2001); *cf. State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard).

The plaintiffs argue that Mahon was qualified to give the neurological and whole person impairment ratings on two bases: his own findings, and his review of another **expert's** conclusions under Rule 703. However, unlike the witnesses whose qualifications were at issue in *Mankoski* and *Hodgdon*, Mahon offered *no* evidence supporting his qualifications to make a neurological impairment assessment, or to give a whole person impairment rating using the AMA Guidelines.

He testified that he had no neurological training or experience. Unlike *Mankoski*, there was no evidence Mahon frequently worked with patients who had neurological ****969** injuries. Unlike *Hodgdon*, there was no evidence that Mahon had neurology experience stemming from his role as an instructor. In short, Mahon provided no reason why he was entitled to offer an opinion in the field of neurology.

As for the whole person impairment under the AMA Guidelines, Mahon testified he had never before used the AMA Guidelines. His testimony revealed he was unfamiliar with terms in the AMA Guidelines, and that he was unfamiliar with the standards and criteria employed under the AMA Guidelines to make impairment determinations. He testified that, in determining Karen Figlioli's impairment in "community activities," one of the six criteria found in the AMA Guidelines, he did not know which community activities qualified for consideration, *nor did he look them up*. In sum, Mahon was not qualified to give an **expert** opinion either on Karen Figlioli's neurological impairment or on her whole person impairment under the AMA Guidelines based upon his own findings.

[11] [12] We also find that Mahon was not qualified to testify as an **expert** through review of another **expert's** findings under Rule 703. N.H. R. Ev. 703. Rule 703 provides that the basis for **expert** testimony may be facts or data "perceived by or made known to the **expert** at or before the hearing." *Id.* Further, "the facts or data need not be admissible in evidence." *Id.* While an **expert** may rely upon inadmissible evidence to form an **expert** opinion, the basis for the conclusion is assumed to lie in his or her special knowledge of such matters. See *Brown v. Bonnin*, 132 N.H. 488, 494, 566 A.2d 1149 (1989).

***625** Mahon relied upon a **report** written by Dr. William Jamieson, a neuro-psychologist who testified at trial. Jamieson was not permitted to testify as to the level of Karen Figlioli's whole person impairment using the AMA Guidelines because he was not properly disclosed as an **expert** for that purpose. As noted above, Mahon had no special knowledge in the field of neurology, and lacked any experience in using the AMA Guidelines. In essence, his reliance upon Jamieson's **report** was merely a repetition of findings that Jamieson had made, but was not permitted to disclose. Therefore, Mahon's testimony was an attempt to circumvent the court's ruling prohibiting Jamieson from testifying to the same effect. This does not fit the confines of Rule 703. See *Bonnin*, 132 N.H. at 493-94, 566 A.2d 1149 (**expert's** proposed testimony not admitted under Rule 703 when it was not his own opinion but mere repetition of another's statements).

The plaintiffs also argue that the ease of use of the AMA Guidelines indicates that Mahon used the AMA Guidelines correctly. We find this argument without merit and warranting no further discussion. See *Vogel v. Vogel*, 137 N.H. 321, 322, 627 A.2d 595 (1993).

[13] Next, we address whether the trial court erred by allowing Peter Clarke to testify as to Karen Figlioli's lost earning capacity as a real estate agent. Peter Clarke, a vocational rehabilitation consultant, testified for the plaintiffs regarding their lost earning capacity as a result of the accident. Clarke performed a vocational assessment of both plaintiffs. Prior to the accident, Karen Figlioli was a full-time mother with four young children living at home. Clarke's original **report** was dated January 16, 2003. It included calculations for lost earnings based upon possible jobs she could have had before the accident: child care worker, personal and homecare aide, cashier, retail salesperson, cook, cafeteria worker, food preparation worker and receptionist. The **report** then compared earnings from those jobs to possible ****970** jobs she was capable of holding after the accident: cashier, retail salesperson, cook, cafeteria worker and food preparation worker.

On April 25, 2003, ten days after the discovery deadline had passed, Clarke filed an addendum to his original **report**, in which he detailed earnings lost based upon Karen Figlioli's hypothetical future career as a real estate agent. In his addendum, he asserted that she had mentioned her desire to become a real estate agent in his initial interview. Prior to trial, the defendant filed a motion to preclude Clarke's testimony relative to his **supplemental report** because it was untimely. This motion was denied.

At trial, in addition to testifying about possible positions she could have held prior to the deck collapse, Clarke testified as to her actual past work *626 experience: part-time work as a billing clerk, full-time homemaker who had raised five children, operating a snow-plow, and a small cat care business. He also testified as to her lost wages of between $22,450 and $24,240 per year, based upon a future position as a real estate agent. The plaintiffs introduced evidence at trial that before the deck collapse, she failed a Massachusetts real estate salesperson exam in 1987, though she received a passing score on one section of the test. On March 15, 2003, after the deck collapse, she failed the New Hampshire Real Estate Examination.

The reasoning behind the trial court's order allowing Clarke to testify relative to his **supplemental report** is missing from the record. The plaintiffs argue that the defendant was timely notified of their position regarding Karen Figlioli's ability to work as a real estate agent through the **report** of Dr. William Burke, a life-care planner who testified at trial as an **expert** on rehabilitation and disability management. Indeed, one sentence, in the middle of a paragraph on page seven of a nine-page **report** submitted by Burke reads: "Her goal of becoming licensed as a Real Estate Agent can be ruled out secondary to her impaired attention, memory and learning." The plaintiffs argue that since the defendant was aware of the substance of Clarke's **supplemental report** from another source, its late disclosure should be excused.

[14] [15] We have long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information. A party is thus entitled to disclosure of an opposing party's **experts**, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions. A party's failure to supply this information should result in the exclusion of **expert** opinion testimony unless good cause is shown to excuse the failure to disclose. *Wong v. Ekberg*, 148 N.H. 369, 372, 807 A.2d 1266 (2002). We review a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. To meet this standard, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *State v. Amirault*, 149 N.H. 541, 543, 825 A.2d 1120 (2003).

It is true that the defendant was aware, from Burke's disclosure, that evidence would be presented at trial that Karen Figlioli had always wanted to be a real estate agent, and that she was no longer capable of achieving that goal. However, the defendant was not aware until after the close of discovery that this evidence would come from a vocational rehabilitation *627 consultant and would include a dollar value. The defendant was only aware that Burke, the life-care planner, would testify regarding this subject.

971 As the plaintiffs point out in their brief, Clarke's **supplemental report "ratif[ied] and put a dollar figure to the real estate earning impairment" cited by Burke. The evidence that Karen Figlioli wanted to become a real estate agent, and now was unable to do so, was admitted from other sources, including her own testimony.

The plaintiffs have not shown good cause why Clarke's **supplemental report** was disclosed past the discovery deadline. Allowing Clarke to testify as to the subject matter disclosed in the **supplemental report** was an unsustainable exercise of discretion by the trial court.

[16] The final issue on appeal is whether the trial court erred by allowing the introduction of evidence of other defects in the construction of the house to prove that Karen Figlioli's mental ability was intact prior to the accident. This evidence was offered to rebut evidence offered by the defendant that she had difficulties with attention and comprehension prior to the accident. Karen Figlioli's mental ability, both before and after the accident, was an issue at trial because the plaintiffs claimed she suffered permanent neurological impairment. The plaintiffs presented the testimony of three of her sisters as to what she was like before and after the accident. The plaintiffs also presented **expert** testimony from Jamieson, Burke, Mahon and Clarke as to her difficulty paying attention and concentrating after the accident.

The defendant presented the testimony of Jon Lariviere about his interactions with Karen Figlioli during the house design and construction process. Lariviere testified that he met with her between eighteen and twenty-five times during the design and construction process. He testified that he had to explain things to her repeatedly, that she had a hard time comprehending the effect of some of the design changes she wanted, and, specifically, that she had difficulty understanding that the plywood covering the window frames was only a temporary precaution during the construction period. Lariviere also testified that, prior to the accident, she exhibited many of the traits Jamieson and Burke identified as being a result of the accident.

The plaintiffs argued that this testimony "opened the door" for evidence of other construction defects. Prior to trial, the trial court had ruled that evidence of the other defects, which were the object of the parties' property

damage and economic loss settlement, was inadmissible; however, the trial court now agreed with the plaintiffs and held that they *628 could use evidence of other defects to show that Karen Figlioli was not "always inconsistent, she is not stupid, she saw something that was wrong and she pointed it out." As a result, the plaintiffs asked Lariviere questions about twenty-one separate and distinct defects found in the house after the closing date. No evidence was offered that Karen Figlioli discovered these defects.

[17] [18] [19] We will not reverse a trial court's ruling on the admissibility of evidence absent an unsustainable exercise of discretion. *State v. Cannon*, 146 N.H. 562, 564, 776 A.2d 736 (2001); *cf. Lambert*, 147 N.H. at 296, 787 A.2d 175. "Opening the door" occurs when one party introduces evidence that provides a justification beyond mere relevance for an opponent's introduction of otherwise inadmissible evidence. By means of this mechanism, a misleading advantage may be countered with previously suppressed or otherwise inadmissible evidence. *State v. Fecteau*, 133 N.H. 860, 874, 587 A.2d 591 (1991). The fact that the door has been opened does not, by itself, permit all evidence to pass through, but when a party leaves the trier of fact with a false or misleading **972 impression, the opposing party is entitled to counter with evidence to refute the impression created and cure the misleading advantage. *State v. Blackstock*, 147 N.H. 791, 797, 802 A.2d 1169 (2002).

In this case, there was no misleading advantage that needed countering. The plaintiffs presented days of **expert** testimony as to Karen Figlioli's mental condition. This evidence was **supplemented** by the lay testimony of three of her sisters, who knew her both before and after the accident, knew her much better than Lariviere, and testified as to their personal observations of how her behavior had changed. The defendant offered Lariviere's observations of her before the accident as an attempt to rebut this evidence.

A review of the record reveals that the defendant did not take the position that Karen Figlioli was concerned about mistakenly identified defects, as suggested by the trial court. Rather, the defendant argued that she displayed difficulty with attention and comprehension prior to the accident. Lariviere offered the issue of the window frames as an example to illustrate that she had difficulty understanding *his explanation* of why the window frames appeared so small. It was undisputed that the window frames, when covered with plywood, were, in fact, smaller. Lariviere's testimony concerned the difficulty he had in explaining to her that the plywood was just a temporary precautionary measure.

Since the defendant did not raise the issue of the window frames as an example of a mistakenly identified defect, the evidence of other *629 correctly identified defects is irrelevant. Further, as there was no proof offered that Karen Figlioli herself discovered the actual defects, evidence of the actual defects does not tend to show her mental acuity. The trial court must have found the evidence was prejudicial to the defendant, since it granted the defendant's initial motion to preclude its introduction at trial; therefore, we hold that allowing the plaintiffs to introduce the evidence of these defects was an unsustainable exercise of discretion.

We remand this case for a new trial on the issue of damages only. In doing so, we note that discovery is closed. The testimony of Clarke relative to his **supplemental report** must be excluded from the retrial, as it was not disclosed by the discovery deadline. We also note that the issue of the CPA claim has been adjudicated and was not appealed. As the CPA claim and the enhanced compensatory damages claim are no longer at issue, the testimony of **expert** Kris Larsen will not be admissible at the retrial.

Reversed and remanded.

BRODERICK, C.J., and NADEAU and GALWAY, JJ., concurred.

All Citations

151 N.H. 618, 866 A.2d 962

End of Document

161 N.H. 714
Supreme Court of New Hampshire.

J & M LUMBER AND CONSTRUCTION COMPANY, INC.
v.
J. Robert SMYJUNAS, Jr. and another.

Nos. 2010–259, 2010–356.

Argued: Feb. 16, 2011.

Opinion Issued: April 14, 2011.

Synopsis
Background: Judgment creditor brought action against judgment debtor seeking to collect attorney's fees and costs awarded in previous lawsuit. The Superior Court, Coos County, Vaughan, J., entered judgment on jury verdict in favor of creditor and awarded prejudgment interest from the date of filing of instant action. Both parties appealed.

Holdings: The Supreme Court, Dalianis, C.J., held that:

[1] creditor did not discover injury during previous trial deposition for timeliness purposes;

[2] debtor's account transcript from IRS was relevant;

[3] account transcript's probative value was not substantially outweighed by danger of unfair prejudice;

[4] creditor's failure to disclose **expert** opinion information did not prejudice debtor;

[5] there was no recognized cause of action for breach of the implied covenant of good faith and fair dealing outside of the contractual context;

[6] failure to dismiss breach of implied covenant of good faith and fair dealing was harmless error;

[7] creditor was not entitled to award of post-judgment interest; and

[8] prejudgment interest was available only from the date on which creditor initiated the current action.

Affirmed.

West Headnotes (35)

[1] **Limitation of Actions**
Securities: corporations

Judgment creditor did not discover injury arising out of judgment debtor's improper dissolution of corporation during deposition during previous litigation for purposes of timeliness of creditor's subsequent improper dissolution claim in which creditor sought to recover attorney fees and costs awarded in previous lawsuit; deposition occurred three years before the trial court had been calculated the amount of attorney fees and costs, and creditor had yet to suffer an injury at that point.

Cases that cite this headnote

[2] **Action**
Persons entitled to sue

For a party to have standing, the party must have suffered a legal injury.

Cases that cite this headnote

[3] **Limitation of Actions**
In general: what constitutes discovery

The "discovery rule" has two prongs that must be satisfied in order for rule to apply: (1) a plaintiff must know or reasonably should have known that it has been injured, and (2) a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant. RSA 508:4.

Cases that cite this headnote

[4] **Appeal and Error**
Defenses

Judgment debtor failed to preserve for appellate review his assertion that judgment creditor's unjust enrichment claim was barred by doctrine of laches in action by creditor seeking to recover attorney's fees and costs awarded in prior judgment, where debtor failed to provide a record demonstrating that he presented claim to the trial court.

Cases that cite this headnote

[5] **Appeal and Error**
Interlocutory Proceedings

Any error in trial court's grant of judgment creditor's motion in limine to preclude judgment debtor from relitigating whether he had notice of easement claim when debtor's business owned property at issue was harmless error in action by creditor to recover attorney's fees and costs awarded in underlying easement dispute, where debtor did not dispute that he had knowledge of the easement prior to constructing the store on the property.

Cases that cite this headnote

[6] **Appeal and Error**
Prejudicial Effect

The Supreme Court applies a two-step analysis to determine whether to reverse a jury verdict in a civil case based upon an erroneous jury instruction: (1) the appealing party must show that it was a substantial error such that it could have misled the jury regarding the applicable law, and (2) if the Court concludes that the error was a substantial one, the Court will reverse the jury verdict unless the opposing party shows that the error did not affect the outcome at trial, in other words, the error was harmless.

Cases that cite this headnote

[7] **Judgment**
Proceedings to Enforce Judgment
Judgment
Admissibility

Judgment debtor's account transcript from the Internal Revenue Service (IRS) was relevant in action by judgment creditor to collect attorney's fees and costs awarded in underlying easement dispute in which creditor alleged that debtor improperly dissolved his business to avoid judgment, where account transcript had tendency to show that business substantially depleted its assets soon after creditor notified debtor about its easement claim. Rules of Evid., Rule 401.

Cases that cite this headnote

[8] **Appeal and Error**
Rulings on admissibility of evidence in general
Trial
Admission of evidence in general

The admissibility of evidence is generally within the discretion of the trial court, and the Supreme Court will uphold its rulings unless the exercise of its discretion is unsustainable.

1 Cases that cite this headnote

[9] **Evidence**
Relevancy in general

To be admissible, evidence must be relevant. Rules of Evid., Rule 401.

Cases that cite this headnote

[10] **Evidence**
⇐Tendency to mislead or confuse

A trial judge is granted broad discretion when balancing the probative value of evidence against the possible prejudice resulting from its admission. Rules of Evid., Rule 403.

Cases that cite this headnote

[11] **Evidence**
⇐Tendency to mislead or confuse

Probative value of judgment debtor's account transcript from the Internal Revenue Service (IRS) was not substantially outweighed by the danger of unfair prejudice in action by judgment creditor to collect attorney's fees and costs awarded in underlying easement dispute in which creditor alleged that debtor improperly dissolved his business to avoid judgment, where the primary purpose for admitting the evidence or the effect of its admission was not to provoke the jury's instinct to punish, but rather to establish one of the central issues of the case, that debtor depleted the assets of the corporate entities despite having notice of claim. Rules of Evid., Rule 403.

Cases that cite this headnote

[12] **Evidence**
⇐Tendency to mislead or confuse

Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Rules of Evid., Rule 403.

Cases that cite this headnote

[13] **Pretrial Procedure**
⇐Identity and location of witnesses and others
Pretrial Procedure
⇐**Experts' reports**; appraisals

Parties in civil cases are required to disclose to their opponents any **expert** witness and, unless the parties so stipulate or the court orders otherwise, to provide for each such witness a written **report** that includes certain specific information. RSA 516:29–b.

Cases that cite this headnote

[14] **Pretrial Procedure**
⇐Identity and location of witnesses and others
Pretrial Procedure
⇐**Experts' reports**; appraisals

A party is entitled to disclosure of an opposing party's **experts**, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions. RSA 516:29–b.

Cases that cite this headnote

[15] **Pretrial Procedure**
⇐Facts taken as established or denial precluded; preclusion of evidence or witness

A party's failure to supply required information about that party's **expert** witnesses should result in the exclusion of **expert** opinion testimony unless good cause is shown to excuse the failure to disclose. RSA 516:29–b.

Cases that cite this headnote

[16] **Appeal and Error**
⇐Depositions, affidavits, or discovery
Pretrial Procedure
⇐Discretion of court

The trial court has broad discretion in the management of discovery, and its decisions will be reviewed under an unsustainable exercise of discretion standard.

Cases that cite this headnote

[17] **Appeal and Error**
⇐Depositions, affidavits, or discovery

To show that the trial court's discovery decision was not sustainable, the appealing party must show that the ruling was clearly untenable or unreasonable to the prejudice of his case.

Cases that cite this headnote

[18] **Pretrial Procedure**
⇐Facts taken as established or denial precluded; preclusion of evidence or witness

Judgment creditor's failure to disclose specific information concerning **expert** witness's opinion about judgment debtor's financial state did not prejudice debtor so as to warrant exclusion of testimony in action by creditor to recover attorney's fees and costs awarded in underlying easement dispute, where debtor admitted that he was aware that **expert** was going to review financial records and offer opinions related to the records. RSA 516:29–b.

Cases that cite this headnote

[19] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from

In reviewing a motion to dismiss, the Supreme Court's standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery.

3 Cases that cite this headnote

[20] **Appeal and Error**
⇐Striking out or dismissal

The Supreme Court assumes the plaintiff's pleadings to be true and construe all reasonable inferences in the light most favorable to it when reviewing a motion to dismiss.

Cases that cite this headnote

[21] **Appeal and Error**
⇐Striking out or dismissal

When reviewing a motion to dismiss, the Supreme Court need not assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law.

3 Cases that cite this headnote

[22] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from

When reviewing ruling on motion to dismiss, the Supreme Court engages in a threshold inquiry that tests the facts in the petition against the applicable law.

3 Cases that cite this headnote

[23] **Pretrial Procedure**

Insufficiency in general

Dismissal is warranted if the a petition's allegations do not constitute a basis for legal relief.

Cases that cite this headnote

[24] **Contracts**
Terms implied as part of contract

An obligation of good faith is imposed by statute in the performance and enforcement of every contract or duty subject to the Uniform Commercial Code. RSA 382–A:1–201(b)(20).

1 Cases that cite this headnote

[25] **Contracts**
Terms implied as part of contract
Labor and Employment
Discharge or layoff

The various implied good-faith obligations in contracts fall into three general categories: (1) contract formation; (2) termination of at-will employment agreements; and (3) limitation of discretion in contractual performance.

2 Cases that cite this headnote

[26] **Contracts**
Grounds of action

There was no recognized cause of action for breach of the implied covenant of good faith and fair dealing outside of the contractual context; claim did not extend to parties to "business dealings."

10 Cases that cite this headnote

[27] **Labor and Employment**
Termination: cause or reason in general

"Employment at will" refers to an employment contract that is for an indefinite period of time and is terminable at will.

Cases that cite this headnote

[28] **Contracts**
Terms implied as part of contract

There is an implied covenant in every contractual relationship that the parties will carry out their obligations in good faith.

Cases that cite this headnote

[29] **Labor and Employment**
Discharge or layoff

The covenant of good faith in an employment contract is a not a free-standing obligation that employers have to treat their employees fairly, but is an obligation implied into an employment contract that otherwise would be terminable at will.

Cases that cite this headnote

[30] **Appeal and Error**
Verdict

The rule with respect to general verdicts is that when the Supreme Court is in doubt as to whether the jury would have found as it did if the error had not been committed, the case should be reversed.

Cases that cite this headnote

[31] **Appeal and Error**
⇐Submission of Issues or Questions to Jury

Trial court's error in failing to dismiss judgment creditor's breach of implied covenant of good faith and fair dealing claim in action against judgment debtor to recover attorney's fees and costs awarded in underlying easement dispute was harmless error; jury returned general verdict in favor of creditor, and it would not have been reasonably possible for the jury to find debtor liable on breach of implied covenant of good faith and fair dealing claim without also finding him liable on creditor's unjust enrichment claim.

10 Cases that cite this headnote

[32] **Statutes**
⇐Judicial construction: role, authority, and duty of courts
Statutes
⇐Language and intent, will, purpose, or policy

The Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole.

Cases that cite this headnote

[33] **Statutes**
⇐Plain Language; Plain, Ordinary, or Common Meaning

When examining a statute, the Supreme Court first examines the language of the statute, and, where possible, ascribes the plain and ordinary meanings to the words used.

Cases that cite this headnote

[34] **Interest**
⇐Demand for interest
Judgment
⇐Interest, costs, and expenses of suit

Amount of judgments imposed in underlying easement dispute, including any prejudgment or post-judgment interest, were elements of damages for judgment creditor to plead and prove in action against judgment debtor to recover attorney's fees and costs awarded in underlying action, and therefore creditor was not entitled to award of post-judgment interest from date of filing of underlying action or date of underlying judgments.

Cases that cite this headnote

[35] **Interest**
⇐Necessity
Interest
⇐Commencement of Action

Judgment creditor which brought action against judgment debtor to recover attorney fees and costs awarded in underlying easement dispute was entitled, under statute concerning calculation of interest in an action on a debt or account stated, to have interest run from the time it instituted the current suit, rather than an earlier date, where nothing in the record demonstrated that creditor had made any demand for payment prior to instituting the current action. RSA 524:1–a.

1 Cases that cite this headnote

Attorneys and Law Firms

**951 The Crisp Law Firm, PLLC, of Concord (Jack P. Crisp, Jr. on the brief and orally), and Wiggin & Nourie, P.A., of Manchester (Andrea Q. Labonte on the brief), for the plaintiff.

Cleveland, Waters and Bass, P.A., of Concord (William B. Pribis on the brief and orally), for the defendant.

Opinion

DALIANIS, C.J.

*716 In these consolidated cases, the defendant, J. Robert Smyjunas, Jr., appeals the jury verdict against him in favor of the plaintiff, J & M Lumber and Construction Company, Inc. (J & M), and J & M appeals the decision of the Superior Court (*Vaughan*, J.) to award prejudgment interest from the date of J & M's 2008 writ of summons. We affirm.

**952 *I. Background*

The record reveals the following facts. In 2000, J & M brought an equity action against Gorham Supermarket, LLC (Gorham Supermarket), among others, to enforce J & M's easement rights associated with land in Gorham. In a 2003 order, the superior court, in addition to other rulings, ordered Gorham Supermarket to pay J & M's attorney's fees and costs. Gorham Supermarket appealed, and in a 2004 order, we upheld the trial court's decision. *See J and M Lumber and Construction Company, Inc. v. Gorham Supermarket LLC & a.*, No.2003–0644 (N.H. Aug. 4, 2004). In 2005, the trial court calculated the total amount of attorney's fees and costs owed J & M to be $110,007.01.

In 2008, J & M brought the instant action against Smyjunas, Gorham Supermarket, Bitsy Realty, Inc. (Bitsy Realty) and Tolle Road Partners, *717 Inc. (Tolle Road), seeking to collect the 2005 attorney's fees and costs award. J & M's writ alleged that Gorham Supermarket had not paid any of J & M's attorney's fees and costs, despite the court order to do so, and that, in fact, Gorham Supermarket had been improperly dissolved and its assets depleted to avoid liability. The writ alleged that Bitsy Realty and Tolle Road were the sole members of Gorham Supermarket, which is a limited liability company, and that Smyjunas was the sole owner of both Bitsy Realty and Tolle Road. It also alleged that Smyjunas, Bitsy Realty and/or Tolle Road improperly liquidated and received Gorham Supermarket's assets, leaving Gorham Supermarket without sufficient assets to pay its debt to J & M.

The case was tried to a jury. Before the trial concluded, J & M voluntarily dismissed with prejudice its claims against Gorham Supermarket, Bitsy Realty and Tolle Road. As a result, Smyjunas became the only defendant.

J & M's claims against Smyjunas were: (1) piercing the corporate veil; (2) improper wind up of a limited liability company; (3) unjust enrichment; and (4) breach of the implied duty of good faith and fair dealing. The jury issued a general verdict in J & M's favor, awarding J & M $110,007.01. Thereafter, J & M filed a motion for prejudgment interest dating either from its 2000 equity action or the trial court's 2005 orders requiring Gorham Supermarket to pay J & M $110,007.01 in attorney's fees and costs. The trial court awarded J & M prejudgment interest running only from the date of its 2008 writ. These appeals followed.

II. Smyjunas's Appeal

A. Timeliness of Claims

[1] Smyjunas first argues that the trial court erred by failing to dismiss J & M's claims for improper dissolution and unjust enrichment because, he argues, both claims are time-barred. Under RSA 508:4, I (2010):

> [A]ll personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Smyjunas contends that J & M's improper dissolution claim is untimely because when J & M deposed him in January 2002, it knew or should have *718 known that he had improperly dissolved Gorham Supermarket. He argues that J & M's unjust **953 enrichment claim similarly is untimely because, as of his January 2002 deposition, J & M knew or should have known that he had allegedly received Gorham Supermarket's assets unjustly. Thus, he reasons, J & M should have filed its suit within three years of January 2002 to be timely.

[2] These arguments presume that J & M would have had standing to assert its improper dissolution and unjust enrichment claims in January 2002, three years before the trial court had even calculated the amount of attorney's fees and costs that Gorham Supermarket owed J & M. For

a party to have standing, the party must have suffered a legal injury. *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195, 965 A.2d 1078 (2008). J & M did not suffer an injury from the allegedly improper dissolution of Gorham Supermarket or Smyjunas's alleged unjust enrichment in 2002.

[3] Smyjunas's reliance upon the "discovery rule" to support his arguments is to no avail. The discovery rule allows a plaintiff to commence an action within three years "of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of." RSA 508:4, I. The rule has two prongs that must be satisfied: "First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 713, 7 A.3d 1284 (2010) (quotation omitted). Here, there was *no* injury for J & M to discover in 2002.

[4] Smyjunas next asserts that J & M's unjust enrichment claim is barred by laches because J & M "sat on its rights for more than six years" after his 2002 deposition "before filing suit" on this claim. He has failed to provide a record, however, demonstrating that he preserved this claim for our review by arguing laches in the trial court. Accordingly, we decline to address it. *See Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250, 855 A.2d 564 (2004).

B. Collateral Estoppel

[5] Smyjunas next argues that the trial court erred when it granted J & M's motion *in limine* to preclude him from relitigating whether he had notice of J & M's claim regarding its easement when Gorham Supermarket owned the subject property (1997–1998) and before Gorham Supermarket was dissolved in 2001. The trial court ruled that Smyjunas was collaterally estopped from relitigating this fact because it had been fully litigated and decided in J & M's original suit against Gorham Supermarket. Smyjunas also argues that the trial court erred when it instructed the jury that, "The ***719** Court has already found and ruled that [Smyjunas] had notice of [J & M's] easement over the property that was developed."

[6] We assume, without deciding, that the trial court erred when it granted J & M's motion *in limine* and gave the contested jury instruction. We apply a two-step analysis to determine whether to reverse a jury verdict in a civil case based upon an erroneous jury instruction. *Rallis v. Demoulas Super Markets*, 159 N.H. 95, 98, 977 A.2d 527 (2009). First, the appealing party must show that it was a substantial error such that it could have misled the jury regarding the applicable law. *Id.* at 98–99, 977 A.2d 527. Second, if we conclude that the error was a substantial one, we will reverse the jury verdict unless the opposing party shows that the error did not affect the outcome at ****954** trial; in other words, the error was harmless. *Id.* at 99, 977 A.2d 527. Here, we do not reverse because we conclude that the alleged error was harmless.

Notwithstanding the trial court's collateral estoppel ruling, Smyjunas did not dispute that he knew of J & M's easement before construction began. He testified:

> Q. Now, you will notice in the deed to you—
>
> A. Uh-huh.
>
> Q.—by which you bought the property, there is reference to the right of way, isn't there?
>
> A. Oh, yes. Yes, there is.
>
> Q. And all of your engineering diagrams showed that right of way, did they not?
>
> A. Oh, yes.
>
> ...
>
> Q. And during the course of that investigation [of the status of the property], you must have learned about this J & M Lumber easement?
>
> A. We—yes, we learned about that. We had—we learned about it in the title review. We learned about it in the deeds that we looked at in the very beginning. We looked—so it was—it was—it was fairly well known.

Additionally, J & M's owner, Marcel Nadeau, testified that he called Smyjunas "twice to make him aware that [Nadeau] had a right of way going through that land." He testified:

> ***720** Q. You said that in 1997 you called Mr. Smyjunas twice—
>
> A. Yes.
>
> Q.—to tell him about the easement.
>
> A. Yes, I did.
>
> Q. And did you actually speak with him?

A. I talked to him personally.

Q. And what did you tell him?

A. I told him that I had a right of way, you know, going through that land that he had—that he had purchased ...; that I wanted to protect my right of way because I was going to make use of it.

Q. And when was the next time you spoke with Mr. Smyjunas?

A. I spoke to him after he had started his site work.

....

Q. And what did you tell him then?

A. I told him that they started the thing, and I said, "Don't forget, it's a deeded right of way, it's a right of way of record," and I says [*sic*], "I want to preserve it."

On this record, we conclude that a reasonable juror could not have found anything other than that Smyjunas had notice of J & M's easement over the property. Accordingly, we hold that the trial court's instruction to that effect did not affect the outcome at trial.

C. 1998 Account Transcript

[7] Smyjunas next contends that the trial court erred when it allowed J & M, over his objection, to admit evidence of his 1998 account transcript from the Internal Revenue Service. This account transcript showed that for the year 1998, the joint gross income for Smyjunas and his wife was $2,018,515. Smyjunas's 1999 account transcript, which was also admitted into evidence, showed that in 1999, he and his wife had gross income of $362,611.

Smyjunas asserts that it was error to admit evidence of his 1998 account transcript because it "had no probative value whatsoever" and caused him ***721** "substantial prejudice." He argues that "[i]t is entirely probabl [e] that a juror could have improperly factored in the seemingly very high income earned by ... Smyjunas and his wife in 1998 to determine that he was able, ****955** and therefore should, pay [J & M's] judgment individually."

[8] [9] [10] The admissibility of evidence is generally within the discretion of the trial court, and we will uphold its rulings unless the exercise of its discretion is unsustainable. *N.H. Ball Bearings v. Jackson*, 158 N.H. 421, 431, 969 A.2d 351 (2009). To be admissible, evidence must be relevant. *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *N.H. R. Ev.* 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *N.H. R. Ev.* 403. "A trial judge is granted broad discretion when balancing the probative value of evidence against the possible prejudice resulting from its admission." *McLaughlin v. Fisher Eng'g*, 150 N.H. 195, 199, 834 A.2d 258 (2003) (quotation and brackets omitted). Accordingly, we will uphold the trial court's decision to admit the 1998 account transcript unless Smyjunas demonstrates that this decision was clearly untenable or unreasonable to the prejudice of his case. *See id.*

We hold that the trial court sustainably exercised its discretion when it allowed J & M to admit evidence of Smyjunas's 1998 account transcript. The trial court reasonably found that this evidence had a "tendency" to prove a fact that was "of consequence." *N.H. R. Ev.* 401. Specifically, Smyjunas's 1998 account transcript had a tendency to show that Gorham Supermarket substantially depleted its assets soon after J & M notified Smyjunas in 1997 about its easement claim. This fact, if proved, was, in turn, central to J & M's piercing the corporate veil claim.

[11] [12] The trial court also reasonably determined that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice from its admission. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." *Zola v. Kelley*, 149 N.H. 648, 655, 826 A.2d 589 (2003) (quotation omitted).

Here, contrary to Smyjunas's suggestion, the primary purpose for admitting the evidence or the effect of its admission was not to provoke the jury's instinct to punish, but rather to establish one of the central issues of the case—that he depleted the assets of the corporate entities despite ***722** having notice of J & M's claim. In this context, evidence of Smyjunas's finances during the years in question was highly probative. While admission of the 1998 account transcript arguably was prejudicial, we conclude that the danger of unfair prejudice did not substantially outweigh its probative value. Therefore, the

trial court did not err by admitting Smyjunas's 1998 account transcript into evidence.

D. Expert Witness Disclosure

Smyjunas next argues that the trial court erred when it partially denied his motion *in limine* to exclude J & M's **expert's** testimony. On December 31, 2008, J & M disclosed Richard J. Brauel, Jr., CPA, as an **expert** witness, stating that he had been asked to review the financial condition of Gorham Supermarket and the other corporate entities, including, but not limited to, the assets these entities owned before they were dissolved and the distribution ****956** of same. On March 17, 2010, J & M **supplemented** this disclosure, explaining that its **expert** would also testify "regarding the process of, generally accepted practices associated with[,] and the requirements in New Hampshire for winding up New Hampshire limited liability companies ... and [would give his opinion that Smyjunas] did not follow the usual process, generally accepted practices and the related requirements." The **supplemental** disclosure further informed Smyjunas that the **expert** was "expected to testify [that Smyjunas] failed to account and provide for [J & M's] claim."

On March 18, 2010, Smyjunas filed a motion *in limine* to exclude the **expert's** testimony with respect to both disclosures. Smyjunas argued that the first disclosure failed to provide specifics and "did not remotely comply with the provisions of RSA 516:29–b." He contended that the second disclosure "appear [ed] to exceed [the] scope of opinions 'disclosed' in the first disclosure," and that it was untimely. He also argued that because he had no "meaningful opportunity to respond to the ... second ... **expert** disclosure," allowing the **expert** to give the opinions disclosed therein "would be extremely unfair" and cause him "substantial prejudice."

The trial court granted Smyjunas's motion as it pertained to the second disclosure, but denied it as it pertained to J & M's initial disclosure. Smyjunas argues that this was error. He asserts that because the first disclosure did not comply with RSA 516:29–b (2007), the trial court should have precluded the **expert's** testimony altogether.

[13] RSA 516:29–b, II requires parties in civil cases to disclose to their opponents any **expert** witness and, unless the parties so stipulate or the court orders otherwise, to provide for each such witness a written **report** that includes certain specific information. ***723** *In re Nicholas L.*, 158 N.H. 700, 702, 973 A.2d 924 (2009). Because the parties do not argue otherwise, we will assume that the trial court did not vary the requirements set forth in RSA 516:29–b, II. *Milliken v. Dartmouth–Hitchcock Clinic*, 154 N.H. 662, 670, 914 A.2d 1226 (2006); *see* RSA 516:29–b, II.

Additionally, RSA 516:29–b does not provide for any particular sanction for a party's failure to comply with its mandates. In his brief, Smyjunas appears to assume that our case law regarding the discovery obligations of civil litigants under superior court rules applies to RSA 516:29–b. *See Super. Ct. R.* 35(f). We make the same assumption for the purposes of this appeal.

[14] [15] [16] [17] Under our case law interpreting superior court rules, "[a] party is entitled to disclosure of an opposing party's **experts**, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions." *Laramie v. Stone*, 160 N.H. 419, 425, 999 A.2d 262 (2010) (quotation and ellipsis omitted). "A party's failure to supply this information should result in the exclusion of **expert** opinion testimony unless good cause is shown to excuse the failure to disclose." *Id.* (quotation omitted); *see Super. Ct. R.* Preface. The trial court has broad discretion in the management of discovery, and its decisions will be reviewed under an unsustainable exercise of discretion standard. *Laramie*, 160 N.H. at 425, 999 A.2d 262. "To show that the trial court's decision was not sustainable, the appealing party must show that the ruling was clearly untenable or unreasonable to the prejudice of his case." *Id.* (quotation omitted).

[18] Smyjunas has failed to meet this burden. While he asserts that he "had no notice of the underlying opinions or substance ****957** of the **expert** testimony," the record does not support that assertion. At the hearing on his motion *in limine*, his attorney stated that, after receiving the first disclosure, Smyjunas understood that J & M's **expert** was going to review financial records of the corporate entities "and offer opinions related thereto." Also, at the hearing, it was revealed that Smyjunas conducted no **expert** witness discovery, even though J & M first disclosed its **expert** and the subjects about which he was expected to testify more than a year before trial. Given this record, Smyjunas has failed to demonstrate that the first disclosure's lack of specifics caused him any prejudice, and, thus, has failed to show that the trial court's decision to allow the **expert** to testify about the corporate financial records that he reviewed was clearly untenable or unreasonable to the prejudice of his case. *See id.*

E. Breach of Implied Covenant Claim

[19] [20] [21] [22] [23] Finally, Smyjunas contends that the trial court erred when it denied his motion to dismiss J & M's

breach of implied covenant of good faith and fair *724 dealing claim. In reviewing a motion to dismiss, our standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery. *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611, 992 A.2d 613 (2010). We assume the plaintiff's pleadings to be true and construe all reasonable inferences in the light most favorable to it. *Id.* We need not assume the truth of statements in the plaintiff's pleadings, however, that are merely conclusions of law. *Id.* We then engage in a threshold inquiry that tests the facts in the writ against the applicable law. *Id.* Dismissal is warranted if the writ's allegations do not constitute a basis for legal relief. *See id.*

Smyjunas argues that J & M has failed to plead a claim for breach of the implied covenant or duty of good faith and fair dealing because it has not alleged that it had a contractual relationship with any of the defendants. Smyjunas contends that, without a contractual relationship between the parties, there is no cause of action for breach of the implied covenant or duty of good faith and fair dealing. We agree.

[24] [25] "[A]n obligation of good faith is imposed by statute in the performance and enforcement of every contract or duty subject to the Uniform Commercial Code." *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133, 138, 562 A.2d 187 (1989); *see* RSA 382–A:1–201(b)(20), :1–304 (Supp.2010). Additionally, New Hampshire recognizes a common law "good faith contractual obligation." *Centronics Corp.*, 132 N.H. at 139, 562 A.2d 187. There is "not merely one rule of implied good faith duty in New Hampshire's law of contract, but a series of doctrines, each of them speaking in terms of an obligation of good faith but serving markedly different functions." *Id.*; *see Birch Broad. v. Capitol Broad. Corp.*, 161 N.H. 192, 198 (2010). The various implied good-faith obligations fall into three general categories: (1) contract formation; (2) termination of at-will employment agreements; and (3) limitation of discretion in contractual performance. *Livingston v. 18 Mile Point Drive*, 158 N.H. 619, 624, 972 A.2d 1001 (2009).

[26] New Hampshire law has not recognized a claim for breach of the implied covenant of good faith and fair dealing outside of the contractual context. J & M urges us to acknowledge that parties to "business dealings" generally have an obligation to deal with one another fairly and in good faith and to recognize a claim for breach of this general obligation. J & M does not contend that this claim is recognized in any other jurisdiction and cites **958 scant legal authority to support recognizing such a claim. Under these circumstances, we decline J & M's invitation to create such a new cause of action.

J & M mistakenly asserts that we have already recognized a similar cause of action in the employment-at-will context. When employment is at *725 will, J & M argues, "no contract exists, but an employer nonetheless has an obligation to act in good faith and deal fairly with employees." This argument misconstrues New Hampshire law.

[27] [28] [29] Employment at will refers to an employment *contract* that is for an indefinite period of time and is terminable at will. *See Monge v. Beebe Rubber Co.*, 114 N.H. 130, 132, 133, 316 A.2d 549 (1974). In *Monge*, we held "that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Id.* at 133, 316 A.2d 549. "The rationale underlying *Monge* is that there is an implied covenant in every contractual relationship that the parties will carry out their obligations in good faith." *Cloutier v. A & P Tea Co., Inc.*, 121 N.H. 915, 920, 436 A.2d 1140 (1981). Accordingly, the covenant of good faith to which we referred in *Monge* is a not a free-standing obligation that employers have to treat their employees fairly, but is an obligation implied into an employment contract that otherwise would be terminable at will.

[30] [31] Smyjunas argues that because the jury in this case returned a general verdict, the remedy for the trial court's failure to dismiss J & M's breach of implied covenant claim is to reverse and remand for a new trial. *See MacKenzie v. Linehan*, 158 N.H. 476, 483, 969 A.2d 385 (2009). The rule in New Hampshire with respect to general verdicts is that when we are in doubt as to whether the jury would have found as it did if the error had not been committed, the case should be reversed. *Id.* at 484, 969 A.2d 385. Although Smyjunas states this general rule, he does not demonstrate why it is doubtful that the jury would have returned the same verdict had the breach of implied covenant claim been dismissed, and we fail to see why we should entertain such doubt.

To determine whether the jury would have returned the same verdict without the implied covenant claim, we examine whether it would have been reasonably possible for this to be the *only* claim for which the jury found Smyjunas liable. If so, then we would doubt whether the jury would have returned the same verdict if the implied covenant claim had been dismissed. If, on the other hand, the jury could not reasonably have found Smyjunas liable for the implied covenant claim alone without also finding

him liable for another claim, then we would not doubt whether the jury would have still returned a verdict for J & M if the implied covenant claim had been dismissed.

Based upon our review of the jury instructions, we conclude that it would not reasonably have been possible for the jury to find Smyjunas liable on the breach of implied covenant claim without also finding him liable on the unjust enrichment claim. The jury was instructed that to find for J & M on ***726** its breach of implied covenant claim, it had to find that Smyjunas " committed a wrongful act." The jury was also instructed that the specific wrongful act of which Smyjunas was accused was of distributing the assets of Gorham Supermarket without accounting for J & M's claim and knowing that J & M had a claim.

The same wrongful act forms the basis of J & M's unjust enrichment claim. The ****959** jury was instructed that to find in J & M's favor on its unjust enrichment claim it had to find that Smyjunas "committed a wrongful act" and that the wrongful act of which he was accused was "the distribution of money when [he] should have reasonably known that J & M ... had a claim that was likely to lead to the judgment."

Because the same wrongful act forms the basis of both claims, if the jury found in J & M's favor on its implied covenant claim, the jury would have also found in J & M's favor on its unjust enrichment claim. Moreover, the damages J & M sought were the same for *all* of its claims. The jury was instructed that "the damages [J & M] seeks are fees and costs in the amount of $110,007.01."

Because it is clear that if the jury found for J & M on the implied covenant claim, the jury would also have found for J & M on the unjust enrichment claim, and because J & M sought the same damages for both claims, we have no doubt that had the implied covenant claim been dismissed, the jury would have returned the same verdict. Accordingly, although we hold that the trial court erred when it failed to dismiss J & M's breach of implied covenant claim, this error does not require us to reverse and remand for a new trial.

III. J & M's Appeal

We next address J & M's appeal, which concerns the trial court's award of prejudgment interest. After the jury verdict was returned, J & M filed a motion for statutory prejudgment interest calculated from the date on which it filed its first action (August 3, 2000) or, alternatively, for statutory post-judgment interest calculated from the dates of the trial court's 2005 orders awarding it attorney's fees and costs (August 8, 2005, and November 14, 2005). *See* RSA 524:1–a, :1–b (2007); *see also Nault v. N & L Dev. Co.*, 146 N.H. 35, 37, 39, 767 A.2d 406 (2001) (explaining that both pre- and post-judgment interest are available under RSA 524:1–a and RSA 524:1–b). The trial court awarded J & M prejudgment interest from the date of its 2008 writ against Smyjunas. J & M argues that the trial court erred by failing to award it prejudgment interest from 2000 or post-judgment interest from 2005.

[32] [33] Resolving this issue requires that we engage in statutory interpretation. We are the final arbiter of the intent of the legislature as expressed in the ***727** words of the statute considered as a whole. *Estate of Gordon–Couture v. Brown*, 152 N.H. 265, 266, 876 A.2d 196 (2005). We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.*

We first address the interest available as a result of J & M's 2000 action and 2005 judgments. J & M argues that RSA 524:1–b governs its entitlement to interest for its 2000 action and 2005 judgments. RSA 524:1–b provides:

> In all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added forthwith by the clerk of court to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment even though such interest brings the amount of the judgment beyond the maximum liability imposed by law.

J & M's 2000 action was for injunctive relief for which the trial court awarded attorney's fees and costs. For the purposes of this discussion, because no party ****960** argues otherwise, we will assume without deciding that the attorney's fees and costs awarded J & M in its first action constituted "pecuniary damages ... for ... [a] loss for which damages are recognized," and, therefore, that RSA 524:1–b governs the statutory interest available as a result of J & M's 2000 action and 2005 judgments.

J & M asserts, in effect, that when the trial court issued its

orders in 2005, interest was imposed automatically, by operation of law, from the date of J & M's 2000 writ against Gorham Supermarket until the date of payment. Smyjunas counters that in the context of J & M's case against him, the amount of the 2005 judgments, including any pre- or post-judgment interest, were elements of damages for J & M to prove. He argues, "if [J & M] believed it was legally entitled to interest on [the 2005 judgments] per RSA 524:1–a, RSA 524:1–b or the common law, it was incumbent upon J & M to submit that claim to the jury." Here, he observes, J & M did not ask the jury for more than the amount of the 2005 judgments themselves ($110,007.01). He contends that any award of statutory interest on the 2005 judgments would improperly augment J & M's damages post-trial.

[34] We agree with Smyjunas that, in the context of this case, the amount of the 2005 judgments, including any pre- or post-judgment interest, were elements of damages for J & M to plead and prove. We further conclude *728 that because J & M did neither, J & M is not entitled to pre-judgment interest from the date of its 2000 writ or to post-judgment interest from the date of the court's 2005 orders.

The instant case is similar to *Carbone v. Tierney*, 151 N.H. 521, 535–36, 864 A.2d 308 (2004), in which we held that the interest that would have been awarded to the plaintiff had his attorney filed a successful lawsuit against his son and daughter-in-law was an element of damages to be proved. The plaintiff in *Carbone* hired the defendant to sue his son and daughter-in-law for the loss of his home and laboratory equipment. *See Carbone*, 151 N.H. at 523–24, 536, 864 A.2d 308. The defendant filed numerous lawsuits on the plaintiff's behalf, which were all dismissed because of the defendant's failure to comply with various court procedures. *See id.* at 524–26, 864 A.2d 308. Eventually, the plaintiff sued the defendant for legal malpractice, and received a jury verdict in his favor. *Id.* at 526, 864 A.2d 308. The trial court subsequently ordered interest to be added to the jury's verdict. *Id.* at 526–27, 864 A.2d 308; *see* RSA 524:1–b.

The plaintiff also asked the trial court to award interest on the judgment that he would have received had the defendant filed a successful suit against his son and daughter-in-law. *Id.* at 536, 864 A.2d 308. The trial court declined, ruling that the plaintiff had failed to plead or prove his entitlement to such interest as an element of his damages. *Id.* We affirmed, concluding that how much interest the plaintiff would have obtained had the defendant filed a successful suit required resolving numerous factual issues, "including when and where [the plaintiff] would have obtained [such] a judgment." *Id.* Because the plaintiff did not present any evidence to the jury, which would have allowed it to decide these factual issues, we ruled that the trial court correctly denied his motion. *Id.*

Like the plaintiff in *Carbone*, J & M failed to plead and prove its entitlement to pre- and post-judgment interest relative to its 2000 writ against Gorham Supermarket. J & M did not present any evidence to the jury of its entitlement to interest on the 2005 judgments. The jury was instructed that J & M was awarded money in two orders, one dated August 8, 2005, **961 and the other dated November 14, 2005, and was asked to decide the amount of damages to award J & M because of Gorham Supermarket's failure to abide by those orders. Because the jury was required to determine the amount of J & M's damages, and because J & M presented no evidence relating to interest, we conclude that the trial court in this case correctly denied J & M's request for pre-judgment interest from 2000 and for post-judgment interest from 2005.

[35] We next address the interest available as a result of J & M's 2008 action. J & M argues that its 2008 writ was an action on a debt and that RSA 524:1–a therefore applies. RSA 524:1–a provides:

> *729 In the absence of a demand prior to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit. This statute shall be inapplicable where the party to be charged pays the money into court in accordance with the rules of the superior court.

For the purposes of this discussion, we will assume that J & M's 2008 writ was an "action on a debt or account stated or where liquidated damages [were] sought." RSA 524:1–a.

J & M asserts that because it "made a demand for payment of the 2005 Orders (the debt) shortly after the 2005 Orders were made," it is entitled to interest under RSA 524:1–a from the date of its 2005 demand. Under RSA 524:1–a, if a demand has been made before suit, interest accrues from the time of the demand; if no demand has been made, it accrues "from the time of the institution of suit." *In re Estate of Ward*, 129 N.H. 4, 12, 523 A.2d 28 (1986). Here, although J & M asserts in its brief that it made a demand for payment shortly after the

trial court's 2005 orders, nothing in the record on appeal demonstrates that such a demand was made. Accordingly, we cannot disturb the trial court's implied finding that J & M did not make a demand before instituting suit, and, therefore, that interest was available only from the date on which J & M initiated the current lawsuit, and not from the date of its alleged 2005 demand.

For all of the above reasons, therefore, we affirm the trial court's decision to award J & M prejudgment interest from the date of its 2008 writ against Smyjunas. We have reviewed J & M's remaining arguments and hold that they lack merit and warrant no extended consideration. *Vogel v. Vogel*, 137 N.H. 321, 322, 627 A.2d 595 (1993).

Affirmed.

DUGGAN, HICKS and LYNN, JJ., concurred.

All Citations

161 N.H. 714, 20 A.3d 947

End of Document