

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 351 EDA 2008

James V. Gautieri,

Plaintiff-Appellee,

v.

CSX Transportation, Inc.,

Defendant-Appellant.

REPLY BRIEF OF APPELLANT CSX TRANSPORTATION, INC.

*Appeal from the Judgment of the Court of Common Pleas of Philadelphia County
July Term 2006, No. 003847, Entered on March 7, 2008*

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ARGUMENT

In our opening brief, we documented the trial court’s instructional and evidentiary errors, and explained why those prejudicial errors entitle CSXT to a new trial. Tacitly conceding error below, plaintiff does not even attempt to defend all of the trial court’s erroneous rulings. Moreover, to the extent he does try to defend some of the trial court’s errors, plaintiff ignores the law and misrepresents the record. On the *actual* record, rather than plaintiff’s fictionalized version, applicable law entitles CSXT to a new trial.

I. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON ITS OBLIGATION TO ATTEMPT AN APPORTIONMENT OF PLAINTIFF’S DAMAGES.

As explained in our opening brief (at 20–32), CSXT is entitled to a new trial because, over CSXT’s objection, the trial court refused to inform the jury of its obligation to attempt an apportionment of plaintiff’s damages.

Plaintiff does not deny that “there was ample evidence that plaintiff’s damages are, at least in part, attributable to his prior injuries and pre-existing conditions rather than CSXT’s negligence.” CSXT Br. 20. Nor does plaintiff deny that “the trial court was required to instruct the jury on its obligation to apportion plaintiff’s damages between those, if any, attributable to the 2005 incident giving rise to this action and those attributable to his prior injuries and pre-existing conditions.” *Id.* Indeed, plaintiff tacitly concedes that there *was* sufficient evidence to require such an instruction.¹

¹ Plaintiff admits that “[t]he jury in the instant matter was presented evidence of the plaintiff’s prior accidents and medical treatment” and that “[t]he question of a pre-existing condition, whether the condition was aggravated by defendant’s negligence and the impact of the aggravation [were] for the jury to determine and weigh.” Plf. Br. 5. Plaintiff asserts that “the jury found that the plaintiff did not have a pre-existing condition that required any apportionment of the damages” (*id.*), but cites nothing in the record and provides no analysis to support that conjecture. Moreover, there is no way to know what the jury would have done had it been

Rather than dispute CSXT's entitlement to an apportionment charge, plaintiff contends that "the court did not refuse to charge and, in fact, did charge the jury on the law regarding apportionment, in terms agreed to by the defendant." Plf. Br. 4–5. But that is not true. CSXT did *not* consent to the charge as given, and the charge as given did *not* inform the jury of its obligation to attempt an apportionment of plaintiff's damages.

In Defendant's Proposed Instruction No. 40, CSXT requested that the jury be told that, should it find "that the plaintiff's injury was due in part to a pre-existing condition and in part to defendant's aggravation of the pre-existing condition," it then "must determine how much of the plaintiff's injury is due to his pre-existing condition and how much of his present injury is a result of the defendant's aggravation of his pre-existing condition." R.141a. The trial court refused to give the requested instruction, specifically ruling that "[i]t's out." R.1192a–1194a. The trial court did not offer a reason for its ruling. Presumably the court believed that CSXT had not presented sufficient evidence to warrant an apportionment instruction, as that was the only argument plaintiff made in opposition to the proposed instruction. *See* R.1168a, 1171a, 1193a. Tellingly, plaintiff has entirely abandoned that contention on appeal. *See supra* at 1 & n.1. Whatever the court's reason for denying CSXT's requested instruction, CSXT memorialized its objection to the denial of the instruction at the conclusion of the charging conference, expressly stating that "Defendant's [Proposed Instructions] 37 through 40 on apportionment should have

properly instructed. That plaintiff was "qualified to perform his duties as a locomotive engineer" at the time of the accident (*id.*) does not diminish CSXT's entitlement to an apportionment charge. In most, if not all, cases in which an injured worker claims damages under FELA, the worker was presumably qualified to perform his or her job on the day of injury; that fact has not prevented this Court or other courts from requiring an apportionment charge when there is evidence that the worker's damages were attributable, at least in part, to prior injuries or pre-existing conditions.

been given and they were not.” R.1198a–1199a.² Thus, far from consenting, CSXT expressly *objected* to the refusal to give its proposed apportionment instruction.³

Plaintiff’s eleventh-hour argument that the charge given by the trial court was a sufficient alternative to CSXT’s apportionment instruction is equally mistaken. That charge merely told the jury: “There is evidence in this case that the plaintiff may have had a medical condition which existed before September 26th, 2005. The railroad is only liable for damages you find to be caused by the incident of September 26th, 2005.” R.1311a–1312a. The problem with this charge is that it did not explain to the jurors what they were supposed to do if they concluded that plaintiff’s injury was caused in part by his pre-existing conditions and in part by the September 26 accident. CSXT’s proposed apportionment instruction was essential to filling that gap. Absent that instruction, there was an unacceptably high risk that the jury would award *unapportioned* damages so long as it found any causal relationship between the accident and plaintiff’s injury. After all, the jury was expressly instructed not only that CSXT was liable for his injuries so long as negligence on its part “played any part, even the slightest, in bringing about plaintiff’s injuries” (R.1303a), but also that CSXT was “liable for *all of* plaintiff’s injuries” if “you do not separate the pain or disability caused by the past injury from that caused by the injury of September 26th, 2005” (R.1312a (emphasis added)).

² CSXT also renewed its objection in its post-trial motion. *See* R.1853a–1856a. Where, as here, “a party previously submitted a proposed point for charge and, in a post-trial motion, raised the trial court’s refusal to give the charge,” the “issue has been preserved” for appellate review. *Meyer v. Union R.R.*, 865 A.2d 857, 861–62, 2004 Pa. Super. 407, ¶¶ 8, 11 (Pa. Super. Ct. 2004).

³ Plaintiff cites R.1174a and R.1311a in support of his assertion that CSXT “agreed to the charge submitted” and that “[t]he charge as approved by [CSXT] was read to the jury.” Plf. Br. 4. But all that CSXT agreed to was the inclusion of the instruction that “[t]he railroad is only liable for damages you find to be caused by the incident of September 26th, 2005.” R.1311a–1312a. That CSXT agreed to the inclusion of that instruction (which was a perfectly correct, albeit incomplete, statement of the law) does not vitiate CSXT’s objection to the refusal to give a specific apportionment instruction.

In short, the instruction upon which plaintiff now places so much reliance failed to tell the jury of its **obligation** to apportion plaintiff's damages if it concluded that those damages were partly caused by his pre-existing conditions and partly caused by the September 26 accident. When, as here, there is evidence from which a jury reasonably could find that a preexisting condition was a partial cause of the plaintiff's injuries, a court must, upon request, "direct the jury's attention to the issue by a specific instruction" that does not merely "allow" but affirmatively "compel[s]" the jury to apportion the plaintiff's damages. *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 823 (7th Cir. 1985).⁴

Plaintiff does not dispute that under the court's charge "the jury could well have believed, albeit mistakenly, that apportionment was entirely discretionary and that it therefore had no obligation to apportion." CSXT Br. 23. By failing to tell the jury that it was legally **required** to apportion plaintiff's damages (if it found those damages to be at least in part attributable to plaintiff's prior injuries and pre-existing conditions), the charge as given omitted "basic and fundamental material" (*Meyer v. Union R.R.*, 865 A.2d 857, 869, 2004 Pa. Super. 407, ¶ 34 (Pa. Super. Ct. 2004)) and thereby failed to "adequately guide[] the jury in the performance of its fact-finding duty" (*Commonwealth v. Bowser*, 624 A.2d 125, 136, 425 Pa. Super. 24, 44 (Pa.

⁴ "[T]he propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law." *Meyer*, 865 A.2d at 862, 2004 Pa. Super. 407, ¶ 14 (quoting *St. Louis Sw. Ry. v. Dickerson*, 470 U.S. 409, 411 (1985) (per curiam)). The holding in *Lancaster* accurately reflects the well-established principle that "a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense." *United States v. Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994) (internal quotation marks omitted); see also *Cincinnati Fluid Power, Inc. v. Rexnord, Inc.*, 797 F.2d 1386, 1392 (6th Cir. 1986); 9C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2556 (3d ed. 2008). In *Lancaster*, the trial court's failure to give a specific apportionment instruction was held not to be reversible error primarily because "the railroad failed to offer a specific instruction." 773 F.2d at 823. Here, by contrast, CSXT did offer a specific instruction. See R.141a.

Super. Ct. 1993) (internal quotation marks omitted)). Accordingly, CSXT is entitled to a new trial.⁵

II. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT SUPPORTED AN APPORTIONMENT OF DAMAGES.

As recounted in our opening brief (at 32–39), the trial court erroneously excluded evidence that would have supported an apportionment of damages—specifically, portions of Dr. Joseph Bernstein’s testimony, all of Dr. Mitchell Schnell’s testimony, and certain documents that established the extent of plaintiff’s prior injuries. Plaintiff does not deny that a properly instructed jury would likely have apportioned damages if the excluded evidence had been admitted. *Cf.* CSXT Br. 32. Rather than dispute the significance of the evidence, plaintiff argues only that it was “properly excluded.” Plf. Br. 6. It was not.

The trial court excluded one portion of Dr. Bernstein’s testimony on the ground that it was beyond the scope of his expert report, excluded a different portion on the ground that it was confusing, and excluded yet another portion because it purportedly questioned plaintiff’s credibility. *Cf.* CSXT Br. 33–35. Tacitly conceding error below, plaintiff does not even attempt to defend the exclusion of the testimony that purportedly questioned plaintiff’s credibility. As for the testimony that was excluded on the ground that it was beyond the scope of Dr. Bernstein’s report, plaintiff makes the conclusory assertion that it was indeed “outside the scope of the expert’s report” (Plf. Br. 6), but offers no rebuttal to our showing that the excluded testimony was in fact fairly encompassed by Dr. Bernstein’s report. *Cf.* CSXT Br. 33. And,

⁵ It is well-settled that “[a] new trial will be granted where a charge is erroneous in a basic respect and it is impossible to determine the extent to which it was prejudicial.” *Linde Enters., Inc. v. Hazelton City Auth.*, 602 A.2d 897, 899, 412 Pa. Super. 67, 72 (Pa. Super. Ct. 1992) (quoting 62 Pa. Stand. Pract. 2d § 48), *abrogated in part on other grounds by Bilt-Rite Contractors, Inc. v. Architectural Studio*, 866 A.2d 270, 581 Pa. 454 (Pa. 2005).

although he does offer a perfunctory defense of the trial court’s decision to exclude the testimony that was supposedly confusing, plaintiff provides no explanation of how, why, or in what way that (in fact, entirely clear) testimony was confusing. *Compare* Plf. Br. 7 with CSXT Br. 34.

As explained in our opening brief, CSXT called Dr. Schnall to rebut Dr. Abraham’s unexpected testimony that a set of MRIs taken after the incident giving rise to this action showed something different than a set of MRIs taken after plaintiff’s 2000 car accident, but the trial court precluded Dr. Schnall from testifying because he had not produced an expert report. *See* CSXT Br. 35–36. Plaintiff does not dispute that Dr. Schnall’s testimony was offered in rebuttal to Dr. Abraham’s testimony, and does not defend the trial court’s basis for precluding Dr. Schnall’s testimony. Instead, plaintiff invents—and then tries to justify—a ruling that was never made. According to plaintiff, “the decision to exclude the witness testimony was proper and was not an abuse of discretion” because, purportedly, “[t]he trial court properly weighed the probative value [of Dr. Schnall’s testimony] against [its] prejudicial value.” Plf. Br. 8. But, as plaintiff’s failure to provide any record citation indicates, that alleged weighing never occurred. The trial court did not balance the probative value of Dr. Schnall’s testimony against its prejudicial value, let alone find that the testimony’s prejudicial value outweighed its probative value. In fact, the trial court precluded the testimony solely because Dr. Schnall had not submitted an expert report. *See* R.660a, 667a. ***That*** ruling—the court’s actual ruling—was erroneous for the reasons set forth in our opening brief. *See* CSXT Br. 36. Moreover, even if the court had weighed the probative value of Dr. Schnall’s testimony against its prejudicial value, there would have been no basis upon which to exclude it. Plaintiff does not, and cannot, identify anything unfairly prejudicial about Dr. Schnall’s testimony. And, contrary to plaintiff’s assertion that it was “irrelevant” (Plf. Br. 8), the testimony—that the MRIs taken of plaintiff’s back after the 2005 incident giving rise

to this action were “identical” to and “showed the exact same degenerative changes” as the MRIs taken after plaintiff’s 2000 car accident (R.807d)—was clearly relevant to whether plaintiff’s damages were attributable to his 2005 fall or instead attributable to his pre-existing degenerative condition.

Although plaintiff claims that “the trial judge did not limit [CSXT] from questioning the plaintiff with respect to his prior injuries in [CSXT’s] cross-examination” (Plf. Br. 8), there is no dispute that the court in fact excluded—and prevented CSXT from cross-examining plaintiff on—certain documents that established the severity of plaintiff’s prior lower-back injuries. *Cf.* CSXT Br. 37 (citing R.1023a–1026a, R.1029a–1031a). Indeed, plaintiff, who does not dispute the relevance of the excluded evidence, defends its exclusion as “proper” because, supposedly, the court did nothing more than “limit the defense questions on re-cross to those covered by plaintiff’s counsel on re-direct.” Plf. Br. 9. But, as explained in our opening brief, that assertion is both factually inaccurate and irrelevant as a matter of law. CSXT’s attempted cross-examination was in fact well within the scope of plaintiff’s direct examination. *See* CSXT Br. 38. Moreover, even if it were not, CSXT was nonetheless entitled to pursue its cross-examination under Rule 611(b) of the Pennsylvania Rules of Evidence, which expressly provides that “[a] party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case” without regard to the scope of direct examination. *See* CSXT Br. 38–39 (citing cases).

Thus, notwithstanding plaintiff’s unsupported assertion to the contrary, the trial court committed prejudicial error when it excluded portions of Dr. Bernstein’s testimony, excluded all of Dr. Schnall’s testimony, and excluded—as well as precluded cross-examination on—documents that established the extent of plaintiff’s prior injuries.

III. THE TRIAL COURT ERRONEOUSLY PRECLUDED CSXT FROM CROSS-EXAMINING PLAINTIFF’S DAMAGES EXPERT ON A CRITICAL ASSUMPTION UNDERLYING HIS TESTIMONY.

As explained in our opening brief (at 40–47), the trial court erroneously limited CSXT’s cross-examination of plaintiff’s damages expert, Andrew Verzilli. In response, plaintiff does not dispute that Verzilli based his estimate of plaintiff’s alleged damages on the assumption that plaintiff would not retire until age 67, and that Verzilli’s estimate would have been lower had he instead assumed an earlier retirement age. *Cf.* CSXT Br. 40. Nor does plaintiff dispute that on direct examination Verzilli justified his retirement-age assumption as “reasonable” on the ground that age 67 is “normal retirement [age] under social security.” R.1085a. Nor does plaintiff dispute that Verzilli knew that plaintiff—as a railroad employee subject to the Railroad Retirement Act rather than the Social Security Act—was in fact eligible for full retirement benefits at age 60. *Cf.* CSXT Br. 40 & 42 n.31. Nor, finally, does plaintiff dispute that his eligibility for full retirement benefits at age 60 is a fact that tends to “qualify or diminish the impact of [Verzilli’s] direct examination.” *Kemp v. Qualls*, 473 A.2d 1369, 1371, 326 Pa. Super. 319, 324 (Pa. Super. Ct. 1984). Nevertheless, plaintiff contends that the trial court properly precluded CSXT from eliciting from Verzilli the fact that plaintiff was eligible for full retirement benefits at the age of 60.

According to plaintiff, the trial court’s limitation of the cross-examination was correct because any testimony about plaintiff’s eligibility for retirement benefits constituted supposedly inadmissible evidence of a collateral benefit. *See* Plf. Br. 10–14. Confronted with numerous decisions standing for the proposition that evidence of collateral benefits may be elicited on cross-examination when direct testimony offered by the plaintiff “misleads the jury on some issue in the case” and “evidence of collateral source payments is necessary to rebut the testimony” (*Lange v. Missouri Pac. R.R.*, 703 F.2d 322, 324 (8th Cir. 1983) (per curiam); *see*

also CSXT Br. 43–45 (collecting cases)), plaintiff argues that those cases are “distinguishable” because, he says, “plaintiff did not open the door” to such rebuttal in this case. Plf. Br. 12–13.

But plaintiff *did* open the door. His argument to the contrary rests on a distinction without a difference. According to plaintiff, although Verzilli affirmatively justified his retirement-age assumption as “reasonable” based on “normal retirement under social security,” that did not open the door to CSXT’s attempted cross-examination because Verzilli “did not mention the receipt of social security *benefits*.” Plf. Br. 13 (emphasis added). But plaintiff offers no explanation why reference to “social security benefits” would have opened the door but reference to “retirement under social security” did not. As Verzilli himself acknowledged, and as the jury would undoubtedly know from everyday experience, age 67 is the normal retirement age under social security precisely because it is the age at which individuals become eligible for full social security benefits. See R.1099a (Verzilli’s testimony that his retirement-age assumption was based on “the fact that once a person gets to the point that they can get full social security benefits, they’re going to retire”); see also R.63d (discussion in Verzilli’s expert report of retirement-age assumption in light of age at which “individuals can collect full social security benefits”). That Verzilli spoke of “social security” rather than “social security benefits” on direct examination is immaterial; what matters is that he falsely “convey[ed] the impression” that plaintiff was not eligible for full retirement benefits until age 67. *Bartosch v. Lewison*, 413 N.W.2d 530, 533 (Minn. Ct. App. 1987). Because CSXT’s “right of cross-examination . . . includes the right to examine the witness on any facts tending to refute inferences or deductions arising from matters the witness testified to on direct examination” (*Kemp*, 473 A.2d at 1371, 326 Pa. Super. at 324), and because the collateral benefit rule does not allow a plaintiff to “go forward with affirmative evidence . . . and then seek immunity from cross-examination regarding

it” (*Gladden v. P. Henderson & Co.*, 385 F.2d 480, 484 (3d Cir. 1967)), the trial court committed reversible error when it prevented CSXT from cross-examining Verzilli on plaintiff’s eligibility to retire at age 60.

IV. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT PLAINTIFF FAILED TO MITIGATE HIS DAMAGES.

As discussed in our opening brief (at 47–50), the trial court erroneously excluded evidence that plaintiff failed to mitigate his damages. In particular, the trial court erroneously prevented CSXT from introducing evidence—through cross-examination of plaintiff and his vocational expert (Roselyn Pierce), and through direct examination of its own witness (Beverly Jackson)—that plaintiff refused to participate in the vocational rehabilitation program that CSXT operates to assist injured employees in regaining their full employment capacity.

At trial, plaintiff objected to CSXT’s attempted cross-examination of plaintiff and Ms. Pierce on relevance grounds, arguing that “CSX’s vocational services are . . . irrelevant.” R.896a; *see also* R.1014a. On appeal, however, plaintiff has abandoned that argument. He does not deny that the testimony CSXT sought to elicit was relevant. Indeed, on appeal, plaintiff does not even try to defend the trial court’s preclusion of CSXT’s attempts to cross-examine him and Ms. Pierce on his failure to participate in CSXT’s rehabilitation program.

Plaintiff does argue that Ms. Jackson’s testimony regarding his failure to participate in CSXT’s vocational rehabilitation program was “properly excluded” because Ms. Jackson did not produce an expert report and because it would have been “highly prejudicial to the plaintiff” to have required his participation in CSXT’s vocational rehabilitation program while this litigation was pending. Plf. Br. 15–16. But neither justification withstands scrutiny.

There is no merit to plaintiff’s suggestion that the absence of an expert report rendered Ms. Jackson’s testimony inadmissible. As an initial matter, plaintiff’s representation (*see* Plf. Br.

15) that he had “objected to [Ms. Jackson’s] testimony” on the ground that CSXT “failed to produce an expert report from this witness” is false.⁶ Plaintiff made no such objection at trial, and for good reason: Ms. Jackson was offered as a fact witness, not an expert witness. Ms. Jackson helps run CSXT’s vocational rehabilitation program and would have testified, based on her personal knowledge, as to the services provided by that program and as to plaintiff’s refusal to participate in it. *See* R.1063a, 1067a–1068a. Because she was offered as a fact witness, she was not required to produce an expert report as a prerequisite to testifying.

There is likewise no merit to plaintiff’s contention that Ms. Jackson’s testimony was properly excluded on the ground that requiring plaintiff’s participation in CSXT’s vocational rehabilitation program during litigation would have been “highly prejudicial.” Plf. Br. 16. Prejudice is a ground for excluding evidence, but only if the prejudice both is “unfair” and “outweigh[s]” the evidence’s probative value. Pa. R. Evid. 403. Neither prong is satisfied here.

Plaintiff does not deny that he had a duty to mitigate his damages, or that his duty to mitigate included an obligation to seek vocational rehabilitation; nor does plaintiff deny that Ms. Jackson’s precluded testimony would have been highly probative of whether he fulfilled that duty. *Cf.* Plf. Br. 15–17. Thus, there can be no dispute that the precluded testimony would have been highly probative of a material fact. Accordingly, the unfair prejudice, if any, caused by Ms. Jackson’s testimony would have to have been substantial to outweigh its probative value.

But Ms. Jackson’s testimony would have caused no unfair prejudice, let alone the degree of unfair prejudice necessary to outweigh the testimony’s substantial probative value. Even assuming for purposes of argument that Ms. Jackson’s testimony rested on an implicit

⁶ Plaintiff’s failure to provide any record citation in support of his misrepresentation belies its falsity.

requirement that plaintiff participate in CSXT's vocational rehabilitation program in particular,⁷ there is nothing unfair about such a requirement or allowing testimony regarding plaintiff's failure to fulfill it. According to plaintiff, requiring that he participate in CSXT's rehabilitation program would be "highly prejudicial" because it would "subject [plaintiff] to questions by [the] defendant regarding his ability to perform his job duties while he is in litigation." Plf. Br. 15–16. But, as the numerous cases cited in our opening brief and ignored by plaintiff make clear, there is nothing unfair about that. *See* CSXT Br. 48–50 (collecting cases). Plaintiff placed his medical condition and his ability to work at issue when he filed suit claiming that he was permanently disabled; having done so, plaintiff cannot legitimately refuse to answer questions regarding his medical condition or his ability to work.⁸

⁷ In fact, Ms. Jackson's testimony as to CSXT's vocational rehabilitation program and plaintiff's refusal to participate in it does *not* rest on such a requirement. Plaintiff had a duty to mitigate his damages through participation in a vocational rehabilitation program. *See* CSXT Br. 48–49 (collecting cases). That does not mean that he had to participate in CSXT's vocational rehabilitation program; he could have opted to participate in a program provided by someone else. But the fact that plaintiff refused to participate in CSXT's vocational rehabilitation program is, although not necessarily dispositive, nonetheless "relevant to the issue of whether the plaintiff mitigated [his] damages." *Mikus v. Norfolk & W. Ry.*, 726 N.E.2d 95, 110 (Ill. App. Ct. 2000); *see also Edsall v. CSX Transp., Inc.*, 2008 WL 244344, at *4 (N.D. Ind. Jan. 28, 2008); *Yauch v. S. Pac. Transp. Co.*, 10 P.3d 1181, 1188 (Ariz. Ct. App. 2000).

⁸ In terms that call to mind plaintiff's refusal to attend his deposition and independent medical examination, plaintiff contends that it would have been "highly prejudicial" to "require[] the plaintiff to be questioned, examined and investigated in order to assess his ability to work" while his "lawsuit [was] pending." Plf. Br. 15. That contention, however, is not only wrong as a matter of law, but misleading as a matter of fact. Plaintiff voluntarily agreed "to be questioned, examined and investigated in order to assess his ability to work" while his "lawsuit [was] pending." Indeed, plaintiff did so *specifically for purposes of his lawsuit*. Plaintiff retained a vocational expert, Ms. Pierce, to testify on his behalf at trial. To prepare her testimony, Ms. Pierce "assessed" plaintiff's "vocational capacity" through "a diagnostic interview and the administration of a battery of tests." Expert Report of Rosalyn Pierce (Plf. Ex. 7), at 1. Plaintiff expressly consented to Ms. Pierce's evaluation although she "did not offer confidentiality" given that she would be called upon to "provide testimony." *Id.* Having consented to Ms. Pierce's interview and testimony (which were solely for purposes of litigation), plaintiff's objection to

As explained in our opening brief, courts have repeatedly held that “evidence of a FELA plaintiff’s failure to take part in railroad vocational rehabilitation programs is admissible to show that a plaintiff has failed to mitigate his damages” *Edsall v. CSX Transp., Inc.*, 2008 WL 244344, at *4 (N.D. Ind. Jan. 28, 2008). Plaintiff argues that the failure-to-mitigate cases we cited “do not relate to the case at hand” because, purportedly, “plaintiff did, in fact, seek rehabilitation.” Plf. Br. 16. But that assertion is untrue. Plaintiff’s assertion rests exclusively on the fact that he was “interviewed and examined by Rosalyn Pierce, a vocational rehabilitation specialist whose qualifications were accepted by the defendant.” *Id.* Ms. Pierce, however, was retained solely as a testifying expert. Hired by plaintiff’s counsel for purposes of litigation, Ms. Pierce did not offer, and did not claim to offer, any vocational rehabilitation services to plaintiff. On the contrary, as her expert report makes clear, Pierce began her only meeting with plaintiff “by explaining that no counseling relationship, vocational case management, or job placement is implied or intended.” Expert Report of Rosalyn Pierce (Plf. Ex. 7), at 1; *see also* R.875a, 899a.

In sum, plaintiff offers no sustainable defense of the trial court’s exclusion of evidence that he failed to mitigate his damages.

V. HAVING ALLOWED PLAINTIFF TO ARGUE THAT CSXT PLACED PROFITS OVER SAFETY, THE TRIAL COURT IMPROPERLY EXCLUDED CSXT’S EVIDENCE OF THE MONEY IT ALLOCATED FOR SAFETY MEASURES.

As explained in our opening brief (at 50–52), the trial court erroneously excluded evidence of the substantial sums CSXT spent on safety measures. Plaintiff does not deny that he argued to the jury that CSXT sacrificed safety for profits. Nor does he deny that the evidence excluded by the court would tend to rebut that argument. *Cf.* Plf. Br. 17–19. Plaintiff

Ms. Jackson’s testimony (which would have been based on facts independent of litigation) is opportunistic, not principled.

nevertheless contends that the evidence was properly excluded because it was, supposedly, offered in an “attempt[] to delegate [CSXT’s] non-delegable duty” of providing a safe workplace. Plf. Br. 18.⁹ Plaintiff offers no explanation of how the proffered evidence constituted an “attempt[] to delegate” a non-delegable duty. But even if it did, it was nonetheless admissible, perhaps subject to a limiting instruction, through cross-examination of plaintiff because it “tend[ed] to refute inferences or deductions arising from matters the witness testified to on direct examination” and thus “might qualify or diminish the impact of direct examination.” *Kemp*, 473 A.2d at 1371, 326 Pa. Super. at 324.

VI. PLAINTIFF’S BLATANT VIOLATIONS OF HIS DISCOVERY OBLIGATIONS NECESSITATE A NEW TRIAL.

As set forth in our opening brief (at 52–56), CSXT is entitled to a new trial because plaintiff refused to attend his deposition and independent medical examination.

In his responsive brief, plaintiff concedes an important fact. Although the motions judge denied CSXT’s motion to compel plaintiff’s deposition, she stated that she “would have compelled” the deposition “if [CSXT] had noticed it prior to April the 2nd,” the discovery cutoff date. R.161a; *see also* CSXT Br. 11, 53. Plaintiff now admits—as CSXT had informed the motions judge at the time (*see* R.161a; *see also* R.18d–21d)—that CSXT *did* notice plaintiff’s deposition prior to April 2, 2007. *See* Plf. Br. 20 (“the defendant noticed the deposition of the plaintiff for March 27, 2007”).¹⁰

⁹ Plaintiff mischaracterizes the evidence CSXT sought to introduce, erroneously describing it as evidence of how much money defendant CSXT “spent on safety issues in the company generally.” Plf. Br. 18. In fact, as was made clear to the trial court, the evidence concerned how much money CSXT spent on safety specifically in the division where plaintiff worked. *See* R.984a.

¹⁰ The deposition was actually noticed for March 29, 2007. *See* R.19d.

Despite that concession, plaintiff contends that “it is abundantly clear from the record that the failure to take the deposition of the plaintiff clearly rests with the defendant.” Plf. Br. 20. But if that were true, plaintiff would presumably cite portions of the record to support his assertion. Yet plaintiff cites none. There is of course good reason: What the record actually reveals is that plaintiff willfully evaded his most basic discovery obligations.

According to plaintiff, CSXT “cancelled the deposition” and then “cancelled again.” Plf. Br. 20. That is simply untrue. In fact—as contemporaneously documented in the extensive correspondence between counsel for CSXT and counsel for plaintiff, and as verified in affidavits submitted by counsel for CSXT under penalty of perjury—CSXT *never* cancelled plaintiff’s deposition.¹¹ Although CSXT initially agreed to postpone the deposition from March 29 to April 27, and then to May 7, it did so *at plaintiff’s request*. See R.4d (¶¶ 11–12); R.29d–32d; R.34d; R.59d (¶ 7); R.503a (¶¶ 8–11); *see also* CSXT Br. 9. After the May 7 date had to be adjourned because of a status conference, plaintiff’s counsel engaged in an extended stratagem of delay and deception that involved repeatedly refusing to accept or return calls from counsel for CSXT, and then repeatedly renegeing on promises to reschedule the deposition. See R.504a–505a (¶¶ 16, 18–20); R.531a–532a; R.534a–536a; R.541a–542a; R.4d (¶ 13); R.36d–37d; R.39d–43d; R.49d–52d; R.54d–55d; R.57d (¶ 8); *see also* CSXT Br. 9–10. A detailed chronology of plaintiff’s evasions and prevarications is set forth in our opening brief, and although plaintiff makes the unsupported, conclusory assertion that CSXT bears the blame for not taking his deposition, he does not address, let alone refute, any of the specific facts documented therein. *Compare* CSXT

¹¹ Although many of the relevant documents are contained in the record transmitted to this Court (*see* R.171a–587a), others are contained in the record that the Court of Common Pleas erroneously failed to transmit (*see* R.1d–60d). Lest this Court be misled by plaintiff’s misrepresentations, CSXT once again urges the Court to grant CSXT’s pending motion to correct the record and to review the entire record below.

Br. 7–11 *with* Plf. Br. 19–22.¹² Thus, what is in fact “abundantly clear from the record” is that, as set forth in our opening brief, responsibility for “the failure to take the deposition of the plaintiff clearly rests” with plaintiff alone.¹³

CONCLUSION

The judgment below should be vacated and the case remanded for a new trial.

Respectfully submitted,

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Dated: August 10, 2009

¹² Plaintiff also makes the unsupported, conclusory assertion that he “complied with the Case Management Order and abided by the Rules of Civil Procedure.” Plf. Br. 20. But that too is untrue. As detailed in our opening brief (at 7–8 (citing R.419a–422a; R.431a; R.436a; R.447a–448a; R.1551a–1552a; R.1578a; R.14d; R.16d; R.102d–103d)), plaintiff violated Paragraph 2 of the Case Management Order and Rules 4006, 4007.4, and 4009.12 of the Pennsylvania Rules of Civil Procedure by failing to comply with CSXT’s document requests and by providing incomplete and untruthful answers to CSXT’s interrogatories. Once again, plaintiff does not address, let alone refute, any of the specific facts documented in our opening brief, relying instead on a conclusory assertion that is belied by the record.

¹³ Plaintiff’s dilatory conduct with respect to the scheduling of his deposition is what accounts for the fact that, as stated in our opening brief (at 10), CSXT did not notice plaintiff’s independent medical examination until July 2007. Consistent with standard trial practice, CSXT wanted to take plaintiff’s deposition before conducting the independent medical examination, so that plaintiff would be locked into his testimony before the results of the examination were known. Thus, while it is true that the IME was not noticed until after expiration of the discovery deadline (*cf.* Plf. Br. 21), that fact is attributable to plaintiff’s misconduct with respect to the scheduling of his deposition.

CERTIFICATE OF SERVICE

I hereby certify that I on this day I caused two (2) copies of the foregoing Reply Brief of Appellant CSX Transportation, Inc., to be served upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.App. P. 121:

Service by first-class mail, postage prepaid, addressed as follows:

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