

# THE BULLETIN

## June 2017



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## TABLE OF CONTENTS

<b>Publications Committee Members .....</b>	<b>3</b>
<b>New Agents Committee Members .....</b>	<b>4</b>
<b>General Claims Conference Officers .....</b>	<b>5</b>
<b>IICA Administrative Committee Members .....</b>	<b>6</b>
<b>Past Chairpersons .....</b>	<b>7</b>
<b>General Claims Conference Committee Chairs .....</b>	<b>8</b>
<b>Midwest Claims Conference Review (May 2017) .....</b>	<b>9</b>
<b>Don Lord Writing Competition Information (2017) .....</b>	<b>11</b>
<b>Personalities: <i>Michelle Shea</i> – BNSF Railway Company .....</b>	<b>12</b>
<b>Meet Some of Our Newest Members .....</b>	<b>13</b>
<b>Members Moving Up (Promotions) .....</b>	<b>14</b>
<b>Members Moving On (Retirements) .....</b>	<b>15</b>
<b>Trial Summaries .....</b>	<b>19</b>
<b>New Claim Agents’ Forum – A Perspective on Claims Work .....</b>	<b>25</b>
<b>Technology Committee Report: Positive Train Control .....</b>	<b>27</b>
<b>Writing Submission: “<i>Wrestling with Snakes — The Reptile Theory</i>” <i>Debra Snyder</i> – Third Place – Don Lord Writing Competition (2016) .....</b>	<b>29</b>
<b>Looking Back: “<i>Instructions and Argument to the Jury — The Defense Point of View</i>” (October 1953) .....</b>	<b>35</b>
 <b><u>Case Notes by <i>Stuart A. Schwartz</i>, Legal Editor</u></b>	
<b>FELA — General Jurisdiction — Writ of Mandamus (<i>Christopher S. Barrett vs. Union Pacific Railroad Company</i>) .....</b>	<b>44</b>
<b>FELA — General Jurisdiction — Writ of Mandamus (<i>Lillian Figueroa vs. BNSF Railway Company</i>) .....</b>	<b>51</b>
<b>FELA — General and Specific Jurisdiction — Writ of Prohibition (<i>State ex rel. Norfolk Southern Railway Company vs. Hon. Colleen Dolan</i>) .....</b>	<b>56</b>
<b>FELA — Occupational Injury — Release — Motion to Dismiss (<i>James S. Collier and Mary Elizabeth Collier vs. CSX Transportation, Inc.</i>) .....</b>	<b>62</b>
<b>FELA — Defective Locomotive Seat — Summary Judgment (<i>George W. Straub IV vs. BNSF Railway Company</i>) .....</b>	<b>66</b>

**FELA — Jury Instructions — Motion for New Trial**  
*(Dan Anderson vs. Union Pacific Railroad Company)* ..... 69

**FELA — Slip and Fall — Defense Verdict**  
*(Lunette Young vs. Port Authority Trans-Hudson Corporation)* ..... 73

**FELA — Motor Vehicle Accident — Defense Verdict**  
*(Christopher Wardwell vs. Union Pacific Railroad Company)* ..... 76

**FELA — Defective Shop Equipment — Summary Judgment**  
*(Lou Montgomery and Melissa Montgomery vs. CSX Transportation, Inc. and Jamco Products Inc.)* ..... 79

**FRSA — Employee Discipline — Appeal of Verdict**  
*(Edward Blackorby vs. BNSF Railway Company)* ..... 85

**FRSA — Employee Discipline — Summary Judgment**  
*(Kelly Heim vs. BNSF Railway Company)* ..... 90

**Advertisers Index** ..... 94

**Advertising and Subscription Information** ..... 95

**Help Keep the Claims Personnel Directory Current** ..... 97

***The Bulletin* Mission Statement, Cover Photo Credit, and Caption** ..... 98

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# THE BULLETIN

June  
2017

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Serve as a resource for the AAR Publications Committee and the railroad claims industry by submitting articles and features for publication in *The Bulletin*. Act as a point of contact for those new to the industry to help stay connected to some of the newest thoughts and ideas for the greater good of the railroad claims field. Promote *The Bulletin* to groups and individuals within the railroad claims industry and those that support it.

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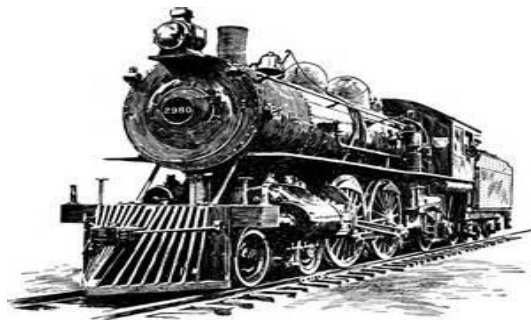
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## ***Midwest Claims Conference Review May 2017***



This year's two-day conference in beautiful St. Louis began on a soggy note, but ended with sunny skies. Jamie Lukehart of Union Pacific welcomed everyone with some local trivia and set the stage for Nick Lamb of Thompson Coburn.



Jamie Lukehart

Mr. Lamb provided a brief course on constitutional law and jurisdictional changes. Next up, Eric Peterson of PhotoFAX explained the benefits of unmanned surveillance versus manned surveillance, in terms of the extended duration of information gathering. The merging of technology with proven practices was demonstrated with stealthy accuracy, to the extent that many were thoroughly paranoid the rest of the conference.

Brian Rowe of Union Pacific covered some key points on the importance of accurate record keeping, how to establish and maintain best practices, and the explaining of the total safety culture associated with of "Courage to Care" program at Union Pacific. The day

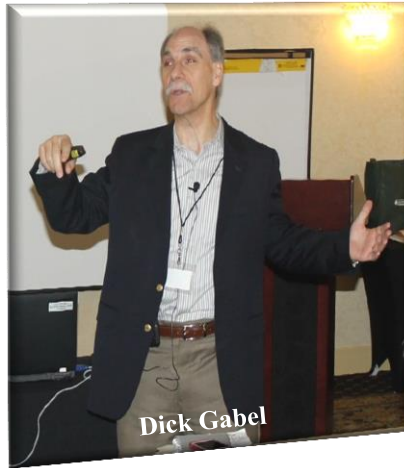
was closed out by Phil Daum of Engineering Systems, Inc., (ESI) sharing his knowledge of tank car technology and safety advancements.



Brian Rowe

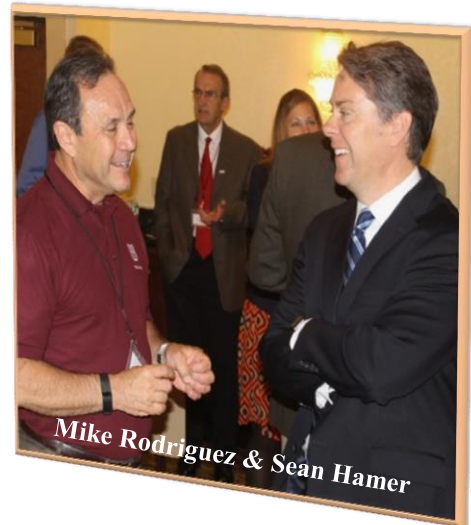
Day two began with Brian Stofferan of Sweeney Law Firm's masterful dissection of "My Cousin Vinny." The issues of statements, procedures, and proper identification were discussed. Sean

Hamer, of Yeretsky & Maher explained how “law suit loans,” are becoming a big trend and in some cases are negatively guiding litigation. Steve Buckley of Buckley & Buckley provided a derailment case study and also a helpful resource of [openrailwaymap.org](http://openrailwaymap.org).

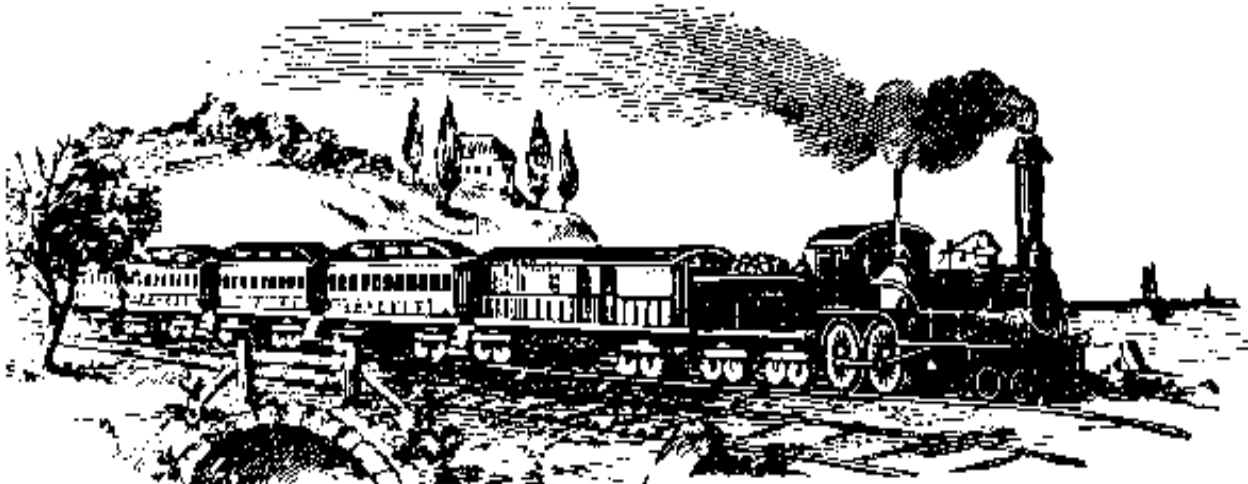


Dick Gabel of Union Pacific educated the group on signal operation and how track circuits work. Mr. Gabel was adamant that we stay in our expertise lanes. He cautioned that being armed with this new knowledge did not make us all signaling experts.

This was my first time attending the Midwest conference and I enjoyed the opportunity to mix and mingle with fellow railroad claims professionals in a relaxed learning environment. I was totally impressed by the content of the presentations and the manner in which they were presented. The city, while somewhat under water and stressed, was very welcoming and a great place to visit. My thanks to the organizers and support staff that made the conference run so smoothly, as well as the City of St. Louis, MO, that weathered the storm so gracefully.



*Josh Martinez*, Union Pacific Railroad





**2017  
Don Lord  
Writing  
Competition**

All entries submitted by the June 1, 2017, due date are now in the hands of our Publication Committee members and undergoing the review process. Upon completion of the review process, the winners will be selected and announced at the General Claims Conference. In addition, the names of the winners will be published in the December 2017 issue of *The Bulletin*.

First Place will receive a <i>plaque...and</i>	\$1,000.00
Second Place will receive a <i>plaque...and</i>	\$750.00
Third Place will receive a <i>plaque...and</i>	\$500.00
Honorable Mention* will receive a <i>certificate...and</i>	\$250.00

\*The number of Honorable Mention winners will be based on ten percent of the number of essay entries.

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## ***Personalities***

In this issue, we are pleased to feature *Michelle Shea*, Director Training for BNSF Railway Company in Topeka, KS.

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Many in our industry know Michelle Shea from her participation in the AARGCC Education Committee and at the AAR Claims School in Overland Park, KS. At BNSF, Michelle has earned an excellent reputation in her leadership role in training and quality assurance. Michelle has a BS in Political Science from Kansas State, in addition to a Master's in Legal Studies from West Virginia University. The countless hours she put into earning her Master's Degree were Michelle's way of demonstrating to her two daughters the value of education, and instilling in them a sense of pride and achievement. Michelle began her railroading career in 1993 as a clerk in Santa Fe's crew management office in Topeka, KS. From there, she moved to the

Timekeeping department, and traveled across the system training TY&E employees how to use a computer. You can imagine the challenges she encountered at that time, and the stories she could tell. She recalls an older gentleman who just could not grasp the concept of a "mouse;" she believes he retired shortly thereafter.

Michelle joined BNSF's Claims Department as a Claim Representative in Minneapolis in 1997, and worked there until 2002, at which time she moved to Newton, KS with her new husband — a BNSF Roadmaster. They moved back to Minneapolis in 2004, where she was one of the first two Evidence Preservation Representatives for BNSF. In 2011, Michelle received a promotion to Manager of Quality Assurance and was transferred to Kansas City. In 2015 she was promoted to Director of Claims, and she currently manages the training and quality assurance functions of her department. Of the many awards that Michelle has received over her years in the claims field, the most meaningful was a leadership award for her role in BNSF's Claims Accreditation Program (CAP) training program — the first ever online railroad claims training program. Michelle and her husband, Brian, have been married for 15 years and have two daughters; 14-year-old Samantha, and 12-year-old Sara. Samantha is a year-round competitive swimmer, Sara is a soccer player, and both girls are in band at school. As a family, they take lots of road trips and spend time with extended family at their lake cabin in Minnesota, where they fish, ski, tube, and enjoy floating on their pontoon boat. Michelle and Brian enjoy tackling home improvement projects and would someday love to try flipping houses.

As Michelle reflects back over her career, she finds it interesting that it was a single conversation with a department leader during a break at a meeting years ago that was the turning point in her career. That person recognized Michelle's unique talents and offered her new opportunities that propelled her into her current role, in which she is most passionate; knowing how things work, developing systems and processes, and effectively training others so they can be the best that they can be.

*Lorri Savidge*, Publications Committee

## ***Meet Some of Our Newest Members***



**Brandon K. Whitley**, Claim Agent, joined the Norfolk Southern Claim Department on March 10, 2017, in Atlanta, GA. Brandon grew up in Corinth, MS, and started with Norfolk Southern May 29, 2003, as a conductor in Memphis, TN. He has worked in the NS transportation department from 2003, being promoted several times from yardmaster to assistant trainmaster to trainmaster. He also worked as an assistant superintendent of operations for the CP in Chicago, IL, for a short time. It is fair to say that Brandon has worn many hats at the railroad. Brandon's free time is spent with his children, Bo, who is 3 and his 3-month-old fraternal twins, Charlotte and Tucker.

**Joe Hovanec**, Senior Manager of the West, joined the Amtrak claims department in Oakland, CA, on February 27, 2017. Joe grew up in Bethesda, MD. He attended the University of Maryland and obtained a degree in Business Administration from the University of Maryland University College. Prior to Amtrak, Joe spent 27 years with GEICO, working his way up from claim examiner and supervisor positions to claims manager/director roles. He spent most of his career in the Mid-Atlantic region, but also managed a branch office in the Seattle, WA area. In his free time, Joe enjoys spending time with his family, golfing, reading, and playing basketball.



**Frank DeGraw**, Senior Claims Specialist, joined the Amtrak claims department in Albany, NY, on February 13, 2017. He is a native to the Albany, NY, area. Frank received his Bachelor's of Science in Business Management in 2009, and is currently pursuing his MBA with Southern New Hampshire University. He served in the U.S. Navy from 1998 to 2006, and participated in Operation Enduring Freedom and Operation Iraqi. Frank previously worked as a Bodily Injury & PIP claims adjuster at State Farm Insurance. Away from work, Frank enjoys golf, spending time with his family, doing home improvement projects, and target shooting.



## ***Members Moving Up***



### **Norfolk Southern Corporation**

***Darrel Gray:*** On April 1, 2017, was promoted from Casualty Claims Trainee in Atlanta, GA, to Claim Representative in Birmingham, AL.

***Jason Cramer:*** On April 1, 2017, was promoted from Casualty Claims Trainee in Chicago, IL, to Claim Representative in Mount Laurel, NJ.

***Doug Maxwell:*** On April 1, 2017, was promoted from Senior Claim Agent in Atlanta, GA, to Claims Development Manager for the Southern Region in Atlanta.



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## ***Members Moving On***



### **Amtrak**



Cecil Wingo began his railroad career with the Chesapeake and Ohio Railway (Chessie System) on ***December 31, 1981*** at Russell, KY, as a road patrolman. Cecil retired from the National Railroad Passenger Corporation on ***March 17, 2017*** as a Manager of Claims at Chicago, IL.

During his time as a railroad policeman, Cecil was promoted to Lieutenant of Police in June of 1985, working in Kentucky and West Virginia. Prior to his railroad employment, Cecil was a deputy sheriff with Roanoke County Sheriff's Office for nine years. Cecil earned numerous certifications during his time as a law enforcement officer; Police Instructor, EMT, S.W.A.T., DEA Drug School, FBI Bomb School, First Aid and CPR Instructor.

Cecil was hired by National Railroad Passenger Corporation in March of 1997 as a Senior Claims Representative in the Chicago office. During the Rollout of RCD1 in 1999, Cecil acted as a Transitional Work Coordinator and Claims Representative for over a year.

Over the years, the job titles changed several times, and Cecil was promoted to Senior Claims Representative in September of 2003. In 2008, Cecil was promoted to Manager of Claims Services for the Central Division. For a number of years Cecil worked with the AAR Claims School as a committee member and acted as an instructor for parts of the basic and advanced schools.

Cecil earned his Bachelor's of Science in Criminal Justice and Sociology (double major) from West Virginia State College in Institute, WV, in 1986. In the future Cecil plans on traveling with his wife of 27 years, Beverly, visiting with his many grandchildren, and deciding what he is going to do in his second career.

***35 Years***

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**CSX Transportation, Inc.**

**Norbert Trojanowski** began his career with Conrail on *September 8, 1978*, as a trackman in Chicago, IL. He retired *March 16, 2017*, as District Manager for CSX Risk Management in Toledo, OH.

After a dozen years in the track department, Norbert came to the Conrail Claims Department as a Claim Agent. He was promoted to Assistant District Claim Agent in October 1995 and moved to Toledo, OH. After the Conrail merger in 1999, Norbert became Manager of Field Investigations for CSX and was promoted to District Manager in 2013.

Norbert was involved with coaching new Managers of Field Investigations, and spent time on the CSX Risk Management Training Committee.

*38 Years*

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**CSX Transportation, Inc.**

**Paul Janssen** began his career with the B&O on *October 5, 1977* as a Carman's Apprentice in Baltimore, MD. He retired *March 16, 2017*, as District Manager for Risk Management in Baltimore/Halethorpe, MD.

After about a decade in the mechanical department, Paul came to work for the claims department in Baltimore in 1987. In 1990, he accepted a promotion and went to work for the environmental department in Jacksonville, FL. Paul left the railroad for a private consulting position from 1994 to 2004 and returned as a Manager of Field Investigations for CSX in Baltimore, MD. Over the years, Paul has written articles published in *The Bulletin*. He developed environmental training modules for CSX and was a coach/mentor for newly hired Managers of Field Investigations.



Paul plans on spending retirement with his children and grandchildren and living on the east coast of Maryland hunting and catching fish and crabs.

*39 Years*

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**CSX Transportation, Inc.**

**Carl Kaiser Jr.** began his career with the B&O on **July 1, 1978**, as a road patrolman in Washington, D.C. He retired **March 16, 2017**, as Director Risk Management in Baltimore, MD.

After a stint with the police department, Carl accepted a position as a Claims Representative for CSX in Baltimore, MD in May 1986. Carl was promoted to District Manager in 2004, and promoted again to Director Risk Management in 2014, both positions keeping him in Baltimore.

Carl served on the MFI Development Committee and represented Risk Management as coach for the Associate Development Program. One of his favorite tasks was working with the Baltimore Ravens in assembling a team to provide rail safety for the fans entering and exiting the stadium across active tracks.

Carl's retirement plans will include family and friends, boating, volleyball and travel.

*38 Years*

**Kansas City Southern Railway**

**Jerry Eakin** began his career on **September 20, 1965**, as a station agent-telegrapher with the Illinois Central Railroad out of Memphis, TN. He retired **April 2, 2017**, as the Director of Occupational Claims for The Kansas City Southern Railway Company in Jackson, MS.

He served in the military from 1966 until 1968. He earned a Bachelor's Degree in Accounting from The University of Mississippi. His railroad employment was continuous, but included spinoffs and mergers (Illinois Central, Illinois Central Gulf, MidSouth Rail, and KCS). His career included several accounting positions with MidSouth Rail in Jackson and the KCS in Kansas City. His claims career began in 1996 at Jackson where he stayed, holding the positions of Claim Agent, General Claim Agent, Manager, and Director of Occupational Claims.



Jerry was an active member of several AAR committees, a presenter at the claims school, and recipient of the Paul C. Garrott Award. He frequently said the railroad industry is a great place to work, and loved the challenges of being part of a successful, complex and vital American industry. One of his favorite comments to everyone – “Set the standard and set it high.”

Jerry and his wife Ruth have been married 43 years and plan to remain home based in Madison, MS, but you may see them anywhere (national parks, airports, cruise ships, or on the road). Be on the lookout for their Mississippi RV license plate that reads “2RAMBLE.”

He is forever grateful to the many wonderful friends who helped him along his way, the support of Ruth, and to his mother for getting him an interview with the railroad in 1965.

Jerry sends his best wishes to everyone for a long, happy, healthy career and a rewarding future retirement.

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*51 Years*

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## Union Pacific Railroad



*James (Jim) Moore* began his career on *March 1, 1987* with the Union Pacific Railroad as a Claim Representative in Van Buren, AR. He retired on *April 30, 2017* as General Director Risk Management at Union Pacific Railroad in Omaha, NE.

Jim left the claims department in 1992 and became the Manager Administration & Purchasing in Van Buren, AR, for the Van Buren Service Unit. By September 1994, Jim returned to the claims department as Manager Occupational Claims in Omaha, NE. In July 2006, Jim was promoted to Senior Director Occupational Claims in Omaha, NE, followed by General Director Risk Management, Omaha, NE, in April 2011.

Jim's most invigorating career highlights include his promotion to Manager Occupational Claims, and the most challenging was handling a six-fatality crossing incident. He says his most enjoyable experience in claims was leading Union Pacific's National Risk Management Service Center.

In retirement Jim plans to develop his handyman skills, sell his home, buy an RV, and travel the United States for a year or two before settling down south of Omaha, NE.

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*30 Years*

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## **TRIAL SUMMARIES**



*We appreciate the reporting of trial results to our Managing Editor, Jim Swan, via email attachment to [jswan18@cox.net](mailto:jswan18@cox.net).*

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### **Jerry Griffin vs. Consolidated Rail Corporation and American Premier Underwriters**

This FELA lawsuit was filed in the Philadelphia Court of Common Pleas by Jerry Griffin, a 64 year old former trackman/operator, and was tried the week of March 6, 2017. Plaintiff, who worked for Penn Central from 1973-1976 and Consolidated Rail Corporation (Conrail) from 1976 to 2011, alleged that he developed kidney cancer as a result of exposures to asbestos and mineral spirits. Conrail was represented by Dave Damico and Dan Donahoe of Burns White; APU was represented by Casey Jones of Blank Rome; plaintiff was represented by Ray Forceno and Dan Levin.

Griffin testified that he was exposed to asbestos while performing work on brake shoes, brake bands on large cranes, asbestos rope from track repair operations, asbestos in camp cars in which he claimed he spent as much as one third of his career sleeping, and from asbestos in various buildings. He testified that the conditions in the camp cars were deplorable and that he was excessively exposed to asbestos dust while performing these work activities. Additionally, although not extensively discussed, Griffin claimed exposures to mineral spirits which he used as a degreaser to clean parts as well as to clean his hands.

In addition to plaintiff, two co-workers testified at trial, and they supported plaintiff's alleged exposures. Plaintiff also called Leonard Vance, a well-known industrial hygienist and former OSHA employee, who testified that the railroad defendants violated the OSHA asbestos regulations promulgated in 1971, failed to properly test the work place, failed to properly monitor plaintiff, failed to properly train and educate plaintiff, and as such, failed to provide a reasonably safe place to work.

Plaintiff called Dr. Arthur Frank as his medical expert, Dr. Frank opined that asbestos and mineral spirits contributed to plaintiff's kidney cancer.

Conrail presented testimony from Dr. David Sidransky, a world renowned oncologist from Johns-Hopkins. Dr. Sidransky testified that there is no definitive epidemiological literature that links asbestos and benzene fumes to kidney cancer. Further, Sidransky was able to point to Griffin's history of hypertension, high cholesterol, cigarette smoking and family history of kidney cancer (two brothers) as causes of his kidney cancer.

Conrail also called Dr. Gregory Fino who read plaintiffs chest x-rays obtained from 2003-2015 and opined that plaintiffs lungs did not exhibit any signs of asbestosis, pleural thickening, or pleural plaques.

Conrail's last witness was Larry Liukonen, a certified industrial hygienist very familiar with the railroad. He testified regarding the numerous studies in the scientific literature that did not show hazardous levels of asbestos from brake shoes; the fact that Conrail had gotten rid of asbestos-containing brakes and rope by the early 1980's; that Conrail replaced the old camp cars with trailers and eventually moved trackmen into hotels; and that Conrail had published a notice to all employees in 1983 that advised them to see a physician if they felt they had been exposed to asbestos.

On March 9, 2017, the jury returned a **defense verdict\***, 10-2, finding that Conrail and Penn Central were not negligent. Rodney Tatum managed the claim on behalf of Conrail.

*Ellen Goering*, Senior General Attorney, Norfolk Southern Corporation Law Department

**T.W. Putnam vs.  
Norfolk Southern Railway Company**

This FELA hearing loss lawsuit was tried to a defense verdict in Colbert County, AL, in February 2017. By way of background, plaintiff Putnam, an active employee who was 50 years of age at the time of trial, primarily worked as a service attendant in Sheffield Yard. Plaintiff began work in 1990, at which time Norfolk Southern Railway's (NSR) hearing conservation program was in place. In 2006, plaintiff was notified of a change in his hearing in the higher frequencies. Plaintiff alleged hearing loss due to rail cars passing through the hump retarder and working around running locomotives and noisy main shop air compressors. However, during his testimony at trial, plaintiff admitted that he had undergone safety training which included training on proper PPE. He also admitted to noise exposures outside of his work at NSR, including prior employment operating a rivet press at a manufacturing facility and riding motorcycles.

Two co-workers testified at trial. One retired coworker, whose employment began before the implementation of the hearing conservation program, was quite hard of hearing and testified regarding noise at the yard. The other coworker testified regarding noise from engines left running while being serviced, but also testified he was always provided with hearing protection when requested.

The testimony of plaintiff's medical expert, Dr. Emmett, was read into the record. Although Dr. Emmett testified that plaintiff's hearing loss was noise induced, he acknowledged that he did not

have the requisite information to give a definitive opinion as to whether the hearing loss was caused by noise at work. Plaintiff's liability expert, Gene Saywell, is an industrial hygienist who had worked at a local General Electric plant for many years. His noise testing in this case consisted of renting a dosimeter and reading its manual, and then monitoring the plaintiff. Mr. Saywell testified that while compliance with "OSHA standards will keep you from getting fined," more conservative standards were used by "most industries." On cross examination, however, Mr. Saywell admitted that he had no criticism of the NSR's Hearing Conservation program, and further admitted that he did not factor into his testing the time engines were not idling or when plaintiff was on breaks.

NSR presented testimony of a current supervisor regarding noise exposures indoors and outside at the yard. Several former supervisors testified regarding the use of hearing protection, the availability of ear muffs to NSR employees and the annual testing and training regarding hearing protection.

Industrial hygienist, Larry Liukonen, NSR's liability expert, testified regarding noise testing conducted at NSR which was within applicable standards. He also explained time-weighted averages, and discredited Mr. Saywell's findings, which did not take into account the normal activities of plaintiff's work day. Lastly, Dr. Jay Benson, a local otolaryngologist, testified that the hearing loss was not noise related, but due to his age, genetics, and other factors. He further testified that even if the hearing loss was noise related, exposures at work were not the cause.

After only 18 minutes of deliberation, the jury returned a **defense verdict\*** for NSR. This case has not been appealed. It should be noted that NSR had previously filed a motion for summary judgment based on plaintiff's lack of evidence on breach of duty, foreseeability and causation, which was granted by the Court in May, 2015. However, the Alabama Civil Court of Appeals reversed the trial court's ruling and remanded the case. NSR filed a Petition for Cert to the Alabama Supreme Court on January 28, 2016, which was denied. NSR was represented by Turner Williams and Mike Ray of Burr Forman. Plaintiff was represented by Robert Willson Jenkins, Jr. Rodney Tatum, Manager Occupational Claims, managed the claim for NSR.

*Ellen Goering*, Senior General Attorney, Norfolk Southern Corporation Law Department

### **Vaughn Frailey vs. BNSF Railway Company**

On October 6, 2010, trackman Vaughn Frailey was 54 years old with four years of service with BNSF. While working on a steel gang near Moorcroft, WY, Frailey claimed he injured his right shoulder removing a bent spike with a claw bar. As Frailey started to remove the spike, a nearby welding foreman witnessed him struggle. The foreman radioed Frailey to stop, but Frailey continued to push on the claw bar until it slipped off the spike. Frailey denied hearing the foreman.

Frailey heard a pop in his right shoulder and immediately felt pain. After conservative treatment, he underwent rotator cuff repair surgery on January 11, 2011. He returned to work on August 2,

2011, with no restrictions. He did not seek any further treatment on his right shoulder. He continues to work for BNSF.

Frailey alleged a general FELA negligence claim for his shoulder injury. BNSF filed multiple pretrial motions to dispose of the case that were denied by the Court. Trial began on February 13, 2017, in the District Court of Scottsbluff County in Gering, NE. The Honorable Leo Dobrovolny presided over the trial. Frailey was represented by Jim Zimmerman of Zimmerman Law Firm in Gering, Nebraska. BNSF was represented by Kate Martz and Tom Sattler of Sattler & Bogen, LLP in Lincoln, NE. BNSF's counsel was assisted by Claim Representative Matthew Dimmitt.

Frailey originally argued BNSF failed to provide him with a hydraulic spike puller to remove the spike. He conceded one was available elsewhere on the gang, but he never asked for it. Ultimately, the evidence at trial showed that the hydraulic spike puller would have been unable to remove the spike due to the spike's condition and how the spike bent in toward the rail. Frailey then argued the claw bar was not reasonably safe because BNSF knew it could slip. Despite his claims, Frailey admitted the claw bar was the right tool for the job and a reasonably safe tool.

BNSF argued Frailey was specifically trained to use the claw bar to anticipate slipping, and his overexertion while encountering difficulty was the reason he slipped. Frailey eventually accepted some personal responsibility for the incident. One of the highlights of trial was when the foreman, who witnessed the incident, demonstrated proper use of the claw bar and explained the work processes. He was a long-time employee who owned BNSF's safety culture and personified the men and women of BNSF.

After two days of trial, the jury returned a unanimous **defense verdict\***. Frailey did not appeal.

*Kate Martz*, Attorney, Sattler & Bogen, LLP

### **Jerry Linnear vs. The Kansas City Southern Railway Company**

Plaintiff Jerry Linnear, a 53-year-old locomotive engineer with 23 years of service with Kansas City Southern Railway (KCSR), claimed he injured his lower back while setting a wheel-type handbrake on a locomotive on May 18, 2015. Mr. Linnear reported that he was setting the brake when the chain slipped suddenly, causing his back to immediately hurt. Mr. Linnear refused medical treatment and would not complete any injury forms.

The locomotive was inspected immediately after notification of Mr. Linnear's injury and no exceptions were found. Mr. Linnear informed KCSR before the beginning of his next shift that he had retained legal counsel and was seeking medical treatment at a nearby clinic. Mr. Linnear was initially diagnosed with a lumbar strain. Mr. Linnear received epidural steroid injections and completed 81 physical therapy sessions over a 10-month span. Mr. Linnear returned to work after missing 357 days.

The two-day trial commenced on September 20, 2016, in the 14th Judicial District, Dallas County, Texas. The Honorable Judge Eric Moye presided. Plaintiff was represented by Jerry Easley and Blake Arata, of Rome, Arata and Baxley in New Orleans, LA. Attorney Paul Wickes of Wickes Law in Plano, TX, defended KCSR. Claim Agent Michael Scranton was the handling agent for KCSR.

In their complaint, plaintiff alleged KCSR negligently failed to provide the plaintiff with a reasonably safe place to work; failed to comply with industry standards; failed to issue, follow, and enforce safe procedures and rules, statutes and regulations; failed to provide reasonably safe and suitable equipment, tools, appurtenances and devices; failed to warn; failed to properly instruct, train and supervise; failed to provide adequate manpower; and failed to inspect, maintain and repair. Additionally, plaintiff alleged negligence per se due to violations of the Locomotive Inspection Act and the Safety Appliance Act.

Plaintiff's counsel focused on establishing that the brake did not need to be proven defective, but that it merely did not operate efficiently. Evidence was presented of rub marks where the chain hung against the locomotive frame and expert testimony from John David Engle attempted to prove this as evidence of inefficient operation. Liability defense expert, Bill Jacobs, testified that the rub marks were from the ordinary swinging of the chain during movement of the locomotive in service. In closing arguments, plaintiff's counsel asked the jury to award \$400,000 in economic losses plus whatever the jury thought appropriate for pain and suffering. After two-and-a-half hours of deliberation, the jury returned a **defense verdict\***.

*Jeri Wright*, Publications Committee

### **Richard Hawk vs. BNSF Railway Company**

Richard Arthur Hawk, age 83, was diagnosed with malignant mesothelioma on May 16, 2014, and passed away on November 7, 2014. In 1949, Mr. Hawk was hired by the Great Northern Railroad (a predecessor of BNSF) as a telegraph operator. He worked in that capacity until 1963. From 1963 to 1983, Mr. Hawk worked for Anaconda Aluminum where he handled raw asbestos to make filters for laboratory testing. Mr. Hawk went into buildings containing the pot lines where insulators were removing and installing asbestos insulation. His estate filed three asbestos bankruptcy trust claims associated with Mr. Hawk's work. The estate settled lawsuits with Fisher Scientific, Metropolitan Life, and Atlantic Richfield, leaving BNSF as the sole defendant.

Plaintiff filed suit against BNSF Railway Company and several non-railroad companies asserting that his mesothelioma was caused by occupational asbestos exposure. Regarding the Great Northern, plaintiff claimed that he was exposed to asbestos-contaminated vermiculite while Mr. Hawk worked in Libby from approximately 1950 to 1955. Vermiculite was mined by the Zonolite Company (later W.R. Grace), refined, and then loaded into rail cars for shipment. After leaving the W.R. Grace loading facility, the railcars were stored in the Libby railyard. Plaintiff contended that the railroad knew that the Libby vermiculite ore was contaminated with asbestos based on geological surveys conducted in the late 1950s, and the railroad should have known that

the refined vermiculite transported in its railcars was also contaminated with asbestos. Plaintiff claimed that piles of vermiculite accumulated in the railyard from leaking boxcars, and Mr. Hawk was exposed to “clouds of asbestos dust” when trains passed and disturbed the air. Based on AAR documents, the Great Northern knew, beginning in the 1930s, that asbestos was capable of causing disease. However, the Great Northern failed to implement industrial hygiene programs or educate its workers as to the dangers of asbestos exposure from vermiculite. Thus, procedures were not put in place to protect Mr. Hawk from asbestos exposure while he worked at the Libby yard.

A two-week trial took place in Ft. Worth, TX, before Judge Melody Wilkinson. The plaintiff was represented by Chris Panatier of Simon, Greenstone, Panatier, Bartlett located in Dallas, TX. Chad Knight (formerly of Hall & Evans, LLC) of Knight Nicastro, LLC represented BNSF. Plaintiff’s experts included Dr. Edwin Holstein, a medical doctor who specializes in occupational medicine. Dr. Holstein reviewed air monitoring performed by W.R. Grace and concluded that Mr. Hawk’s exposure dose at the Great Northern would have been 1.05 f/cc, which he opined would have increased Mr. Hawk’s risk of developing Mesothelioma by several fold.

BNSF’s defense theme was that W.R. Grace never informed the Great Northern that the vermiculite concentrate was hazardous or contained asbestos. As a common carrier, Great Northern was entitled to rely on disclosures contained in bills of lading, which in this instance repeatedly identified the shipments as vermiculite only, and not a hazardous material. In fact, W.R. Grace engaged in a conspiracy to conceal any health hazards related to its products from its employees, customers, the residents of Libby, and the government, which was not exposed until 1999. Furthermore, commercial asbestos products were widely advertised in the 1950s and 1960s as being safe products for in-home use. Thus, the Great Northern had no reason to suspect that Mr. Hawk was at risk for developing asbestos-related disease from exposure to vermiculite even if it was aware that the refined vermiculite contained small amounts of asbestos.

BNSF’s experts included Dr. John Kind, an industrial hygienist and toxicologist. Dr. Kind testified that based on his review of industrial hygiene testing, Mr. Hawk was not exposed to asbestos above background levels while employed with the Great Northern. Mr. Hawk’s only significant exposures were at Anaconda Aluminum. Therefore, BNSF was not negligent in handling the vermiculite in railcars, and Mr. Hawk was provided a reasonably safe work environment. Plaintiff’s counsel asked the jury in closing argument to award \$7.5 million. The jury returned a **defense verdict**.\*

*Chad Knight*, Knight & Nicastro Firm, Boulder, CO

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\*Verdicts are reported as: **defense verdicts**, **verdict in favor of plaintiff**, or **verdict in favor of defendant**. Verdicts in favor of plaintiff are verdicts above the last offer. Verdicts in favor of defendant are verdicts less than the last offer.



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## ***New Claim Agents Forum*** ***A Perspective on Claims Work***

We are pleased to feature an article by *James Higgins*, Claim Agent with Norfolk Southern Corporation.

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### **Technology and its Impact on Risk Management**

How has technology changed investigative approaches from previous generations to today? In order to answer this question, one must look at the earlier iterations of risk management. With the advent of the railroads in the 19<sup>th</sup> Century, little to no thought was put toward risk management. The primary thought process was to build and ship freight with little regard to employees' or the public's well-being. With the proliferation of newer technologies, such as personal computers, event recorders on engines, and cell phones, an abundance of information has become available for all parties involved in the claims process. This ever-changing landscape has not only led to an increase in the complexities of risk management, it has also shifted how investigations are being completed to mitigate these risks.

Thirty years ago, for example, home computers were rare, cell phones were not widely used, and locomotive event recorders were few and far between. Fast forward to 2017 and these pieces of technology are absolutely vital to a railroad's ability to mitigate its losses. With all of these changes, those in railroad claims have had to alter how they investigate and evaluate their claims. Combining generational differences with these advances, the area of risk management has simultaneously become easier and more labor intensive for those in the field.

To truly understand a shift in any process, one must understand where the process started. In the early years of railroad claims, the information that needed to be preserved was rudimentary by today's investigative standards. From basic internal reports to somewhat primitive photography tools (also, by today's standards), the preserved information provided a much smaller snapshot as to what actually happened. On the other hand, there were fewer controls in place to mitigate any damages. With the rise of FRA restrictions and additional safety controls, the necessity to obtain as much information as possible became paramount, if anything, to help mitigate losses. This more restrictive environment, in conjunction with the idea of risk management, has helped make cases more complicated. At a minimum, it would give a claim agent the tools necessary to make an effective defense of their company. The overall effect of this shift has lent itself to reducing case counts, while making files more complicated; in essence, acting like a double-edged sword.

As previously stated, technology has had a profound impact in increasing the prominence of risk management as a viable corporate policy. The cellphone has not only made communication more readily available, it has also accelerated the rate at which information can move from those in the field to those reviewing incidents. In most cases today, claim agents have cell phones on them and can be notified of an incident fairly quickly. They can then, in turn, notify their

supervisors of the incident. Another item that has had a tremendous impact on the risk management world has been the personal computer. This particular item revolutionized how society has developed and maintained a massive network of information, i.e. the internet. Couple this with the prevalence of social media, and one can truly appreciate the amount of information now available to those in the claims profession and to those attempting to make claims against railroads.

Drones have also entered the arena of rail freight transportation. Having drones on hand allows maintenance of way supervisors to survey an area, bridge, or derailment remotely without exposing additional personnel to potentially hazardous situations. The benefits of using a tool like this can be tremendous if implemented correctly, especially driving down costs in today's uncertain financial reality. Currently, Norfolk Southern is in the process of purchasing drones for use in their maintenance of way department sometime during Fiscal Year 2017. The other Class I railroads are in similar stages of obtaining this technology in hopes of fully integrating them into their day-to-day operations. For better or worse, it seems that drones are here to stay and will become more engrained into how investigations are conducted. Due to the ever-evolving technological landscape, as well as differing styles of investigation, it is difficult to stay ahead of the curve and obtain all relevant data in an incident.

Looking at FELA and the safety requirements set forth by the FRA, changes to and improvements in the way investigations were completed were bound to happen. The development of more sophisticated technologies has further led to additional shifts in how claims are investigated. In conclusion, through a combination of technological advances and changes in safety culture, risk management has become both easier and more labor-intensive for investigators, and will continue to evolve for the foreseeable future.



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## ***Technology Committee Report***



### **Positive Train Control**

What is the technology involved with Positive Train Control (PTC)? PTC requires an excessive amount of on and off-board technology to communicate with communication networks, both on board and along wayside segments, to feed information back to the command terminal.

These communication networks consist of global positioning systems, radio networks and servers used in the day-to-day operation of the railroad industry.

Global positioning systems' key functional involvement in the PTC system will be to provide employees in charge of dispatch centers with important information they will use to track the movement of trains. Additionally, radio networks in the radius of train traffic will assist with real-time information to back-office servers, both onboard and along wayside segments. These servers communicate with both the radio network and dispatch control systems.

Rail companies can choose from different types of PTC technology to protect day-to-day operations and communities. The following systems could be found: Advanced Civil Speed Enforcement System, Communications Based Train Control, Electronic Train Management System, Vital Electronic Train Management System, Incremental Train Control System, Enhanced Automatic Train Control, Interoperable Incremental Train Control System, SafeNet System and Sentinel System.

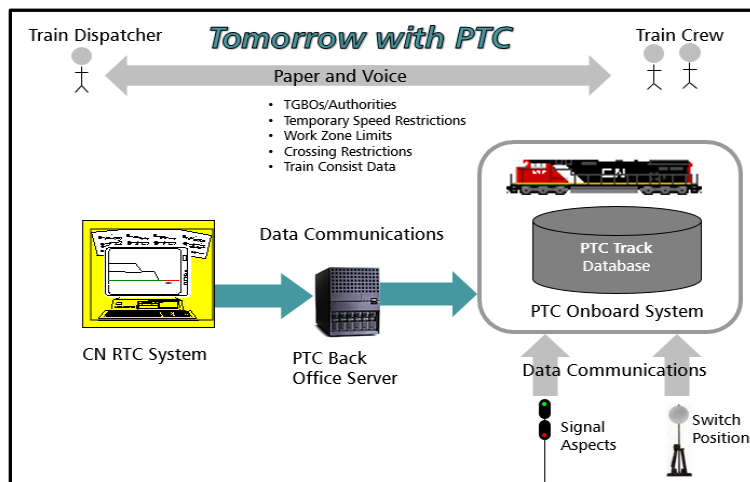
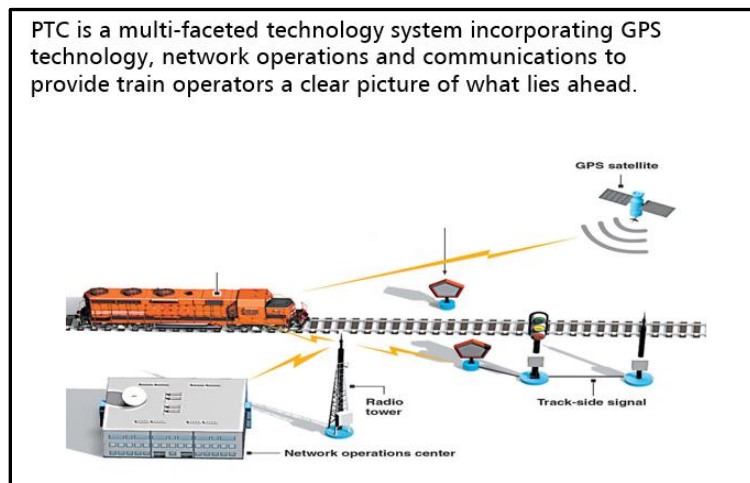
#### PTC Implementation Status by Freight and Passenger Rail

Below is a summary of current overall PTC implementation status collectively by freight and passenger railroads for the 4<sup>th</sup> quarter of 2016:

	<u>Freight</u>	<u>Passenger</u>
Locomotives Equipped	42%	41%
Radio Towers Installed	82%	48%
Training Completed	55%	49%
Route Miles in PTC Operation	16%	24%
Track Segments Completed	24%	11%

The system does not slow trains down; it can only stop them. If the system determines the train is not braking sufficiently after warning the crew, it will first apply a full-service brake reduction. If the system determines that the initial full-service reduction is not enough, it will then apply an emergency reduction. PTC will prevent trains from entering planned work limits without authority. If a train enters the calculated stopping distance point with no authority to enter the work zone, and the train has not slowed sufficiently, the PTC system will stop the train before it reaches the work zone limits.

PTC acts when it detects unauthorized movement beyond work limits, such as track authorities and signals. It will also prevent high-speed train-to-train collisions, over-speed derailments, incursions into established work zones, and movements through improperly-lined switches. If the train exceeds a “stopping speed” threshold, the onboard PTC system will enforce a stop.



*Tim Hudson*, Chair Technology Committee

***Third Place***  
***2016 Don Lord Writing Competition***

***“Wrestling with Snakes — The Reptile Theory”***

***Debra Snyder***

Manager Claims  
Kansas City Southern Railway



***Debbie Snyder*** is a Manager Claims with Kansas City Southern in Shreveport, LA. She received her bachelor’s degree in business administration from Indiana University of Pennsylvania in 1978 and her paralegal certificate from Robert Morris College in 1994. Debbie is a third generation railroader, who began her railroad career in 1978 in Pittsburgh, PA, as an extra clerk on the Baltimore and Ohio Railroad. She worked as Claim Agent, Sr. Claims Representative, Occupational Claims Manager and District Manager for CSX Transportation until her retirement from CSX in 2015. Debbie was hired by Kansas City Southern Railway in 2015, taking her and her husband, Paul, to Shreveport, where they are enjoying Southern life.

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**Wrestling with Snakes - The “Reptile Theory”**

We all know part of our job as claims professionals is to investigate claims. An investigation has two purposes; to determine the facts and to preserve the evidence. We all gather facts as it pertains to a particular incident, but in today’s world, is that enough? Over the past several years, the plaintiff’s bar has been implementing a new strategy which is thriving in trial courts across the country. The strategy known as the Reptile Theory does not focus on the facts of an individual accident. Instead, the focus is on the defendant as a whole, putting the defendant on trial attempting to show that the defendant does not care about the safety of the community. The Reptile attorney appeals to the juror’s concerns about their safety and potential harms that could have occurred, or may still happen within the community. He then asks the jury to send a message to the defendant to protect him and the community by awarding a large verdict to diminish the danger. This writing is an attempt to explain the Reptile Theory and suggest how to guard against it.

## **BACKGROUND**

In 2009, David Ball, a North Carolina jury consultant, and Don Keenan, an Atlanta plaintiff attorney, published a book entitled, *“Reptile: The 2009 Manual of the Plaintiff’s Revolution.”* In that book, Keenan and Ball describe a trial strategy they created known as the Reptile Theory. Their book educates plaintiff attorneys on how to apply that theory throughout their case, from discovery to closing arguments.

“The scientific core of Reptile Theory is that there is a latent, “reptile” portion of the human brain. It is fearful and bent on survival. It stays dormant most of the time, thanks to evolution and the relative safety afforded by human civilization. However, it is ready to “awaken” to respond to perceived threats. Ergo, the goal of Reptile tactics is to provoke these fears in jurors, and to make the defendant the object of that fear.”<sup>1</sup>

“The process focuses on utilizing the eventual juror’s desire to expose and punish the existence of danger when it exists in the community around them and to place blame on a defendant large enough and powerful enough to “eliminate” that danger.”<sup>2</sup> The major axiom repeated in *“Reptile”* is: “When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.”<sup>3</sup>

According to the authors, the Reptile Theory was created to fight tort reform which they claim poisoned the jury by making them believe: “1. Lawsuits undermine the quality and availability of health care for your family; 2. Lawsuits ruin the local economy; 3. Lawsuits make everything more expensive; 4. Lawsuits suppress the development of new products; and 5. Lawsuits endanger religion.”<sup>4</sup> The strategy, the authors claim, is the plaintiff’s answer to the damage done by tort reform.

Browsing through the colorful, attention-grabbing Reptile website ([www.reptilekeenanball.com](http://www.reptilekeenanball.com)), one may believe this is just a great marketing gimmick by Keenan and Ball to sell books, DVDs, and get plaintiff attorneys to attend their seminars, but the strategy appears to have fangs. As of May 2016 Keenan and Ball’s website boasts 6.3+ billion dollars across the country in reptile verdicts and settlements since 2009, and over 50 Reptile verdicts and settlements in 2015 that were over 1 million dollars. The website proclaims: “Welcome to the Revolution, the most powerful tool in the fight against tort reform.”<sup>5</sup> Obviously, in some cases, it has been an effective method of inspiring jurors to give plaintiff verdicts and should therefore be acknowledged.

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<sup>1</sup> Beth C. Boggs, *Combating Reptile Tactics in Litigation*, namwolf, 2016 available at: <http://www.namwolf.org/page/reptiletactics/combating-Reptile-Tactics-in-Litigation.htm>

<sup>2</sup> Ann T. Greeley, Ph.D., “A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response” 2015 Section Annual Conference: available at: [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written\\_materials/4\\_1\\_reptile\\_theory\\_of\\_trial\\_strategy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/4_1_reptile_theory_of_trial_strategy.authcheckdam.pdf)

<sup>3</sup> David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff’s Revolution* (Balloon Press, 2009), 17, 19, 73.

<sup>4</sup> *Ibid*, pg 25

<sup>5</sup> Keenan & Ball, *Reptile*; <http://www.reptilekeenanball.com> (as of May 25, 2016)

## THE ATTACK

The Reptile strategy begins early in the case and is developed throughout the entire course of litigation. “Its purpose is to establish arbitrary safety rules which allegedly protect the public and then showing that the defendant broke those rules, thereby endangering the public.”<sup>6</sup> To get to that point, they typically do not focus on the liability facts of the individual accident. They will attack the defendant’s safety record and actions. The strategy will entail extensive document requests where they are looking for admissible things that the defendant did improperly. They are looking for at least one broad safety rule that the defendant allegedly violated, thereby causing plaintiff’s injury.

For Reptilian purposes, a safety rule has five characteristics:

1. It must prevent danger;
2. It must protect people in a wide variety of situations, not just the plaintiff;
3. It must be in clear English;
4. It must explicitly state what a person must do or not do;
5. The rule must be practical and easy for someone in the defendant’s position to have followed.<sup>7</sup>

The Reptile attorney hopes to find some violation of a “safety rule” and use the information obtained through discovery to frame the violation into a community safety issue. “The end goal is to show that the defendant chose not to follow a safety rule, and thereby endangered the community, and by extension, the juror. In theory, the juror’s reptile brain will then take over and will render a large verdict against the defendant to prevent the defendant from endangering the community in the future.”<sup>8</sup>

Through discovery, the Reptile attorney will try to get admissions or contradictions from defense witnesses regarding safety principles. Depositions of key witnesses will “trap witnesses first into agreeing with general safety principles, then move into more specific safety rules and danger avoidance rules, and finally pinning witnesses down on specific safety rules or danger avoidance concepts that were broken by the defendant.”<sup>9</sup> Once the Reptile attorney can establish a safety rule existed and was violated through discovery, they will use those arguments throughout opening statements, trial and closing arguments to entice jurors to protect the community. Instead of asking jurors routine questions during voir dire, they will mold their questions toward their end goal of finding jurors that will protect the public from a dangerous defendant and begin to plant the Reptile seed in their brain. Examples may be: Do you believe the railroad company has a responsibility to protect the general public? Or, do you believe a railroad with a history of

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<sup>6</sup> Kyle J. White, Can Defense Lawyers Co-Opt the Reptile Strategy? DRI-The Voice of the Defense Bar *Strictly Speaking* – Products Liability Committee Newsletter, May 14, 2015

<sup>7</sup> David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff’s Revolution* (Balloon Press, 2009), 52-53

<sup>8</sup> Kyle J. White, Can Defense Lawyers Co-Opt the Reptile Strategy? DRI-The Voice of the Defense Bar *Strictly Speaking* – Products Liability Committee Newsletter, May 14, 2015

<sup>9</sup> (Greeley, 2015)

accidents and safety violations is a danger to the general public? Plaintiff's attorney will most likely expose the safety rule violation and plant the seed of danger into the jury's mind during his opening and follow through during the trial while examining witnesses. At closing, he will "discuss how defendant's behavior can affect the community, state, and country, and follow up with statements that implore the jury to protect society."<sup>10</sup> It is their intent to maximize the jury focus on the defendant's actions (or lack of action) and minimize the focus on plaintiff's responsibility.

An example of this strategy was evident in a trespasser fatality case a railroad had in a small community. The crew was operating their train less than the 25 mph speed limit when they observed an eighteen- year- old man walking adjacent to the tracks, toward the track, and eventually onto the track and was struck by the train. The engineer gave proper warning to alert the trespasser. However, the trespasser ignored the horn and bell and never looked in the direction of the train (probably due to the earbuds defense claimed he was wearing). The crew put the train into emergency and did everything they could to avoid the accident. The case was litigated, and the plaintiff's attorney sent extensive document requests. It wasn't long before the Reptile raised its ugly head. From a review of the event recorder, plaintiff's attorney alleged the engineer did not blow the horn the required 15-20 seconds for the crossing PRIOR to the accident. Although it had nothing to do with the incident, the plaintiff's attorney found his "violation" of not only a railroad operating rule, but also an FRA rule – as he called it, "a federally mandated safety rule designed to protect the public." They continued their attack by alleging the engineer was not trained properly, not disciplined for sounding the horn incorrectly, and the railroad continued to allow him to operate trains through communities endangering the public. In addition, they alleged lack of investigation and spoliation of evidence. Although there were many other facets to this case, plaintiff's attorney followed the "danger to community" theme throughout discovery and eventually the trial, alleging the railroad failed to ensure that its train crews operated trains for the safety of the public. Thankfully, the defense attorneys worked harder and smarter than plaintiff's attorneys on this case and brought home a defense verdict. They were able to make the jury see through plaintiff's attorney's tactics and put the responsibility where it belonged – on the man that ignored multiple warnings and walked into the path of a train.

### **THE COUNTER ATTACK**

As claims professionals, I think the best way to help defend against the Reptile Theory is to approach document collection aggressively during our initial investigation. Just because you believe there is no liability in a case or a slim chance of litigation, don't do a mediocre investigation. Perform a high-quality investigation and keep in mind that these Reptile attorneys are not always looking for documents relative to the accident. They are trying to find documents that no longer exist, hoping to find a spoliation of evidence argument. Rest assured, the document that no longer exists will most likely become the most important document to his case. Think beyond the incident itself and what the Reptile attorney may allege down the line regarding any safety issues.

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<sup>10</sup> Joseph Baiocco and Jedidiah Bernstein, *Fly with the Eagles*, 2014

Many articles have been written about challenging the Reptile tactics. The common defenses for our attorneys coming up against a Reptile attorney are to object readily to irrelevant discovery requests, prepare witnesses to withstand the Reptile questioning in deposition and trial, and keep the jury focused on the incident itself and plaintiff's negligence. They should rebut plaintiff's voir dire questions while picking a jury, and use their opening and closing arguments to put the responsibility where it belongs.

Defense attorneys have successfully filed motions in limine alerting the court that Reptile arguments have no place in the trial because they suggest a community standard of care or a general safety standard as opposed to the standard of care established at trial. They contend any argument from plaintiff's counsel suggesting that protecting personal safety or community safety is the standard of care should be precluded. Defense counsel argues that "the jurors should not be asked to step into the shoes of the plaintiff, decide the case as if they were faced with similar circumstances or to send a message to the defendant or society. It is arguable that these types of arguments are improper, the issues are irrelevant, and the probative value would be outweighed by prejudice to the defendant."<sup>11</sup>

## CONCLUSION

Whether you believe the science behind the Reptile Theory or not, it seems the theory is working in certain cases. As claim professionals, we need to be aware of the strategy and do a good solid investigation including an aggressive document collection to thwart any spoliation argument. We should perform any additional investigative steps to lessen any rule violation or "danger to community" arguments. Lastly, we need to work with our defense counsel to assist them in the fight against these Reptile tactics. Don't let the Reptile get its fangs into your case.



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<sup>11</sup> Joseph Baiocco and Jedidiah Bernstein, Fly with the Eagles: Defeat the Reptile



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## ***Looking Back***

Prior to our current General Claims Conference, which was resurrected in 1977, our predecessors were members of the Association of Railway Claim Agents (ARCA), founded in 1890. Members of the Canadian Pacific Railway General Claims Division found a box of dusty old *Bulletins*, which contained interesting reading of another era. We continue reprinting some of the articles from the last century in *The Bulletin*.

In this issue, we feature an article titled, “Instructions and Argument to the Jury — The Defense Point of View.” It is the 62<sup>nd</sup> article in the *Looking Back* series. The article appeared in *The Bulletin’s* May 1954 issue. It was written by Welcome D. Pierson of the Oklahoma Bar (Oklahoma City). The article was printed with the permission of the American Bar Association Journal (October 1953).

*Dale M. Cisecki*, Publications Committee

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### **Instructions and Argument to the Jury The Defense Point of View**

Many years ago a writer penned these words, “A jury is the mirror of public opinion--may it not throw back a distorted image.” Sorrowfully, I might say that in my experience, juries in several instances have thrown back distorted images--images, which, like Banquo’s ghost in Shakespeare’s immortal tragedy, still haunt me in my dreams.

Some years ago a committee on American citizenship offered a prize to the writer of the best essay on the subject “The Responsibility of the Citizen as a Juror.” One of the gems it contained is the words of the layman, speaking as follows:

I must never assent to a verdict which violates the instructions of the court, or which finds as a fact that which, under the evidence and in my conscience, I believe to be untrue.

How well we of the defense would like to have that type of citizen on our juries!

Instructions to the jury are of two types: oral and written. In either event, the duties of the trial attorney are practically the same. Instructions should be prepared in advance, covering each legal question involved in the case. I follow the practice of having each instruction typed on a separate sheet of letter-size paper so that as the trial of the case proceeds, the requested instructions can be rearranged, other instructions added and possibly some omitted. After the introduction of the evidence is completed these various sheets can be assembled, bradded together and delivered to the trial court.

Some years ago I was waiting my turn on the trial docket in a court down in what we lawyers designate as “Little Dixie,” a tier of counties along the southern boundary of the state. The case ahead of mine on the trial docket was a complicated one, involving intricate questions of law.

The trial judge was one of the old school of unconventional judges. He insisted on instructing the jury orally. He made a point of asking counsel, in the presence of the jury, if they would agree to oral instructions. As the evidence in the case on trial was concluded, the trial judge, without excusing the jury, asked counsel if they would agree to oral instructions. The attorneys on both sides agreed. The trial judge asked counsel if they had any requested instructions. The attorney for the plaintiff had prepared his case; he was ready. He handed the judge a complete set of instructions, including a synopsis of the pleadings. Defense counsel offered no suggested instructions. The trial judge thumbed through the ream of material which counsel for the plaintiff had submitted. He then wheeled around in his chair, faced the jury, and began reading. He read word by word, the instructions prepared by counsel for the plaintiff. After he had completed this task he turned and asked counsel if there were any additional instructions they desired submitted. Timidly, counsel for the defense arose and said, "Judge, will you tell the jury in just plain words under what circumstances they can return a verdict for my client." He lost his case and the case was later affirmed by the Supreme Court.

I have often pondered over the language used by that "Little Dixie" lawyer — "just plain words." Just plain words--that's the idea. Frequently, instructions to the jury are not written in just plain words. Much of the fault of bad jury verdicts has been because judges have been unable to make "crystal clear" to the jury the proper application of simply-stated rules to particular facts. Jurors are not "bookish" men, nor greatly experienced in absorbing the meaning of complicated language, especially when expressed in unfamiliar words typical of most jury instructions. (Judge Oscar S. Caplain, Standardized Jury Instructions).

I have checked over a number of instructions submitted by judges in cases which I have tried. It is astonishing the number of instances where words are used which are perfectly correct, but probably not understood by the average citizen on a trial jury.

About twenty-five years ago, I tried a case in the small inland town of Alton, Missouri, located in the "Harold Bell Wright" country. The courthouse was typical of courthouses of that district, with the big round stove fueled with pine logs where you roasted on one side and froze on the other. The case involved largely questions of law, and I did not feel that I had any chance of winning the case unless the court decided it on the legal questions involved. In any event, a jury was empaneled. It was composed of typical Missouri "hillbillies." The case involved restrictive covenants in deeds which required the approval of the Secretary of the Interior of the United States for their validity. In making my statement to the jury I referred to the fact that it was necessary for these documents to be approved by the Secretary of the Interior of the United States. I then explained to the jury that the Secretary of the Interior of the United States lived in the City of Washington, the capital city of the nation, and it was necessary for him to approve these documents, just as in some instances it was necessary for the county commissioner to approve a claim which one of the jurors might file for doing road work on country roads. When I sat down at the counsel table, the probate attorney for the Osage Tribe of Indians turned and said, "I am glad you told the jury who the Secretary of the Interior was. There is not a man on the jury who would know if you had not told him." This is no reflection on the members of the jury panel in that Missouri case, but in talking to juries, lawyers should realize that they do not understand technical legal words. I believe one of the criticisms which can be properly lodged at

jury instructions, generally, is that they are couched in legal language and do not contain ordinary, plain, down-to-earth English.

If requested instructions are prepared in advance of the trial, they can be used most effectively in the voir dire questioning of prospective jurors. One can frame a question to be propounded to a number of the prospective jurors which encompasses an instruction favorable to your cause which the trial judge will almost certainly submit to the jury. In a conversational tone of voice, a number of the prospective jurors can be asked if they will follow that instruction if the trial judge submits it to them. Naturally the prospective juror will reply in the affirmative. After an affirmative answer is received, I like to follow with the question, "I know I can depend on your doing that, can't I?" Invariably the prospective juror will come back with the answer of "Yes." This goes a long way toward establishing a friendly relationship with that particular juror. To a large extent his thinking has been anchored to your thinking.

I have found in numerous instances that the members of the jury panel take their answers to this question most seriously. During their deliberations, they remember that they have given a solemn promise that they can be depended upon.

I believe in referring to the most important instructions in outlining my theory of defense in the opening statement, also in commenting upon the instructions on every favorable occasion. When the judge finally reads the instructions to the jury you may be gratified to see a number of the jurors look at you with a knowing look as much as to say, "Well, old boy, you knew what you were doing."

It would be most presumptuous for an Oklahoma lawyer to attempt to tell experienced lawyers from other states "how to argue a lawsuit to a jury."

No lawyer can tell another lawyer how to argue his case, even if he is familiar with all of the facts and circumstances. There are many factors involved in the argument of any case to the jury. Quite frequently, the type and character of the argument is determined by the locale or jurisdiction of the court in which the lawsuit is being tried. Down in Oklahoma we have some counties which we defense attorneys would just as soon deed back to the Indians. I do not believe that one should attempt to talk down to a jury, but certainly an argument to a jury composed of farmers or ranchers is organized on a different basis from the type of argument one would make to a jury in the federal court made up almost entirely of business executives.

Another factor which enters into all jury arguments is the personality and ability of your opponent. I assume that in your states, the situation is the same as prevails in Oklahoma. The major portion of the damage suit business generally finds its way into the hands of a comparatively few skilled damage suit lawyers. From experience you learn their tactics, and they learn yours, and through it, the nature of your arguments must be gauged accordingly.

There is a lawyer in Oklahoma, who, during the argument of cases involving injuries to the head, always takes out his watch. He talks to the jury about the watch and says that he can smash it, then take it to a jeweler and have it repaired and it will be as good as new--not so with the human brain. A blow on the head will damage the brain beyond repair. He attempts to convince the

jury that a man who has received a bump on his head no more serious than a football player receives many times in any football game will be a crazy idiot for the balance of his life. This is a very effective argument from the standpoint of the plaintiff. The only way you can beat that lawyer is to tell the story first and give him credit for it. He will tell it again but it is not so effective.

Types of argument have changed entirely within our own period of time as trial attorneys. Those of you who live in rural communities can well remember that in the early days, court day in a rural county seat was an important event. "Gone from the bar are those colorful lawyers whose wit, oratory, and all-around showmanship drew people from miles around to hear them and see them cross swords in some famous trial." ("The Unconventional Judge" by Thomas J. Knight, Kentucky Bar Association Journal, December, 1938).

Many of these suggestions are well known to experienced lawyers. They are random convictions picked up in trial experience. One of the convictions is to "be yourself." Don't try to imitate another lawyer. If you have a gift for wrath and the case lends itself to indignation, let go; though I believe it is better to keep one's powder dry and be calm. If you are naturally quiet and reserved and can talk best man-to-man in a conversational tone, don't take the pose of something else. Don't try to be mean. If you speak slowly and deliberately in your ordinary conversation, speak slowly and deliberately to the jury in your argument. Make the best of your own personality without attempting to imitate someone else.

I have already discussed the value of using the instructions in the argument to the jury. If you are in a jurisdiction where the court instructs the jury before the argument is made, the instructions can be effectively used in the argument, telling the jury that the court is talking to them and not to you. Photographs, diagrams, and exhibits can be used effectively in making a jury argument. The jury can see these exhibits. They can take them to the jury room with them if they are interested.

### **An Outline of the Argument Is Useful to the Lawyer**

I have found it best to make an outline of the argument. The trial of the average damage suit requires several days. There are many recesses. There is generally a break between the time the evidence is closed and the argument commences. Quite frequently the introduction of evidence is completed in one day, and the court adjourns to the next day for the argument. I use this time to outline my argument. A lawyer friend of mine who is a successful trial attorney tells me that the night before the argument is the time to put your feet upon a desk, get a bottle of Bourbon whisky and visit with friends, forgetting about the lawsuit entirely. Here again, you have a choice of methods. I find it best to spend my time outlining what I am going to tell the jury the next day.

I believe that in the argument to the jury, the evidence should be summarized; but I do not like the sing-song method whereby counsel says, "The first witness said this, the second witness said that," and so on and so on, ad infinitum.

The jury has heard the evidence, and if you attempt to discuss it in detail you may misquote it, and they will hold this against you. You can protect yourself by telling the jury that, if you misquoted any of the evidence and your statement is not in accord with their recollection, they should accept their own recollection since it is probably better than yours.

Touch lightly on the evidence that is against you, but discuss it so your opponent cannot charge you with a deliberate attempt to distort the evidence. Hammer away on the evidence in your favor. Even if you have only one witness and your opponent has ten, make that one witness the Hamlet of the lawsuit. If the testimony of a witness is particularly important I have found it beneficial to have the court reporter transcribe his most important statements. During the argument to the jury, read this testimony to the jury, saying "Here is the official record of what this witness said word by word. I thought it important enough to have this transcript made so that I can read it to you." The slow, deliberate reading of these questions and answers is often more effective than your own recollection which the jurors may believe to be faulty. (Trial and Preparation of a Lawsuit, by Sydney C. Schweitzer.)

In recent years, damage suit lawyers have banded together and have made great strides in their own self-improvement. Quite frequently at the trial of important tort actions, the lawyer representing the plaintiff will produce charts, skeletons, diagrams and blackboards. They offer the testimony of a life insurance actuary for the purpose of establishing the measure of damages in the trial of death actions or actions involving permanent disability. The age of the deceased or injured party and his monthly earning capacity are first established. The actuary then testifies as to the cash deposit in form of annuity required to take the place of the earnings of the injured party or the deceased from the time of his death to the age of 65. Damage suit lawyers very graciously stop at the age of 65 and advise both the court and the jury that at the age of 65 workmen are expected to retire and live on their Social Security benefits. The actuary generally commences by testifying as to the amount required in an annuity deposit to assure a monthly income of \$1 per month until the age of 65 is reached. This is followed by testimony showing the cash deposit required to assure a monthly income of \$10, \$100, \$200, \$500, etc.

Various rates of interest are used in establishing the figures, starting with an interest rate of 2 per cent and increasing the rates at degrees of  $\frac{1}{2}$  percent until a rate of  $3\frac{1}{2}$  percent is reached. Counsel for the plaintiff use many different monthly incomes and different interest rates so as to fix large sums of money in the minds of the jury. As the actuary testifies, he writes the figures on a large blackboard, or the attorney for the plaintiff writes the figures on the blackboard as the actuary testifies. The psychological impression on the jury is tremendous. They sit in the jury box and observe the exhibit as it is being created. When the exhibit is completed there will be astronomical sums on the blackboard. If the injured plaintiff or the deceased is a young man with a high earning capacity, the figures on the board will easily establish that, to restore his earning capacity to his family, an annuity of \$100,000, \$200,000, or \$300,000 is required. I am sure that all of you are familiar with this type of evidence. After the figures are written on the blackboard, the blackboard remains on display in front of the jury where they can observe the figures throughout the balance of the trial. During the argument to the jury, the attorney for the plaintiff refers to the figures and then simply tells the jury that he wants them to be an adding machine and add up the amount to which the plaintiff is entitled. One effective answer to this type of argument is for the defense attorney, in his answering argument, to tell the jury that he

does not want them to be adding machines or mechanical devices, but wants them to be human beings and use their reasoning faculties. In addition to the blackboard containing the actuarial figures, damage suit lawyers generally use several other blackboards on which they jot down the main points of evidence, which they contend establish negligence on the part of the defendant. These exhibits are also permitted to remain on display in front of the jury.

The most effective way I know to counteract this type of evidence is to wait patiently until the attorney for the plaintiff has completed his opening argument, and then use a little intestinal fortitude. The defense attorney can simply walk up to the blackboard, which has the large sums of money written on it, calmly pick up an eraser and erase the figures. He can then tell the jury that he is going to write on the blackboard the sum of money that the plaintiff is actually entitled to recover. He picks up a piece of chalk and calmly writes a big round zero on the blackboard, explaining to the jury that the plaintiff is entitled to recover nothing because the evidence conclusively establishes that there is no negligence on the part of defendant. After plaintiff's fine exhibit has been mutilated, defense counsel can pass to other blackboards, apply the eraser again and remove the items of evidence that were jotted down by the attorney for the plaintiff. He can pick up a piece of chalk and jot down the bits of evidence that he considers to be conclusive in establishing that the defendant was free from negligence. He can then explain to the jury the reason he wrote down a big zero on the first blackboard was because the evidence summarized on the other blackboards definitely establishes that there is no liability on the part of the defendant.

Trial tactics of this type generally create a mild commotion in the courtroom. The attorney representing the plaintiff will squeal like a stuck hog, but there is nothing he can do about it. He wrote his version of the trial on the blackboard and the defense attorney is entitled to write his. Quite frequently the attorney for the plaintiff, in his final argument, will attempt to reconstruct the figures or rewrite his points of evidence on the blackboard. If he attempts to do this, he is consuming valuable time. In any event, he has been thrown off his stride and the smooth-running machine he has attempted to establish has been disrupted.

Good damage-suit attorneys are very adroit and shrewd. After a few incidents of the type I have just described, they pivot and change their method of presenting the same dramatic show in the courtroom. In the trial of recent cases, I have observed that the counsel for the plaintiff have had the actuarial figures painted on a large cardboard and placed on an easel in front of the jury. I rather expect, before the tides of time remove me from the arena, to walk into a courtroom some day and find that one of these damage suit lawyers has painted the figures on the cardboard with luminous paint. Another countermove which attorneys for the plaintiff are now using is to bring their own blackboards to the courthouse. If the attorney brings his own blackboards, and writes the figures down on his own blackboards, and his jury speech on his own blackboards, there is another approach. Courteously and calmly, and in the presence of the jury, the defense attorney can ask his opponent if he can borrow his blackboards for the purpose of making a demonstration. The attorney for the plaintiff is placed in a rather bad dilemma. If he refuses, the jury may secure the impression that he is unfair. If he agrees, he loses one act of his show.

As an alternative method, defense counsel may bring their own blackboards to court. They can write their own figures on the blackboards, take the blackboards of the plaintiff down from the

easels, and place their own blackboards on display in front of the jury. Of course, counsel for the plaintiff will remove your blackboards and you will remove his, and the figures presented by his opponent. According to the statistics of the United States Government, thirty-nine people out of one hundred who reach the age of 65 are living on charity, another eighteen are living on public or private pensions, only nine are financially successful, and thirty-four are still working. In other words, according to the statistics, less than 10 percent of the people of the United States are financially successful at the age of 65. It is possible for the defense counsel to establish these statistics by the testimony of an economist, and the best witness for establishing this type of evidence is the dean of the school of finance or school of economics in some outstanding university. The more degrees he has and the more books he has written, the better impression he will create upon the jury. I believe it good strategy to have an expert of your own prepare a chart establishing that by the sound principles of economics, the figures of your opponent are fallacious. After you have displayed your chart in front of the jury, you may place it upon the easel on top of the chart displayed by counsel for the plaintiff, or you may arrange for another easel and have the two charts in view of the jury throughout a portion of the trial and during the argument.

While I am on this subject of statistics: statistics are available from the Bureau of Labor Statistics, United States Department of Labor, establishing that during each year, laborers or workmen in a particular trade or craft have many hours of lost time because of work stoppages, sickness, lack of work, or because the particular type of work involved is seasonal and cannot be carried on during all months of the year. I am not a statistician, and it has been a long time since I studied Economics I, but I can visualize the importance of developing testimony of this type for use of defense attorneys in combating the ever-increasing size of jury verdicts. I am hopefully looking forward to a time when I may have a client who is a crusader and is willing to furnish funds for defending a case by following such procedure. I can visualize the defense of a case when you can call to the witness stand experts in economics and business, spend days, and if necessary weeks, in establishing the fallaciousness of plaintiff's method in establishing the measure of damages. It must be borne in mind that when the plaintiff offers testimony of this type, it presupposes that the injured party or the deceased will be able to work every month of the year until he reaches the age of 65 and that work will be available to him. Any testimony which contradicts this type of evidence is admissible. I hope that sometime the occasion will arise when I can participate in a trial where it is possible for me to meet my opponent on even ground and match him, expert for expert, and if he desires to do so, try the case on economic theories instead of legal evidence.

Since 1951, women have served as trial jurors in the trial of cases in Oklahoma. As a defense attorney I have found that women make excellent jurors. The average woman juror has been compelled to live on a family budget, and possibly the budget is a very conservative one. The lady juror listens more closely to the evidence than a male juror. Contrary to the usual impression, she does not permit sympathy to control her reasoning. Quite frequently I observe that a woman juror enters the jury box with a notebook in her hand and takes notes on the evidence throughout the trial. With a woman's natural intuition, a woman juror can spot a malingerer instantly, and will turn with a vengeance on this type of litigant.

With women serving on a jury, it is necessary for attorneys to be extremely careful about their courtroom manner, their dress and their deportment. It is my experience that a woman juror expects to be treated with courtesy and respect. She expects no unusual favors because she is a woman. I have found it best to treat women jurors the same as men jurors. Make no reference to the fact that they are women. Treat them as citizens and jurors; they appreciate it. They do not expect you to be patronizing or obsequious. A lawyer is on extremely dangerous ground if he attempts to get smart or flirt with the ladies on the jury. There is an interesting story told of a defense lawyer trying a case before a jury on which there was a lady. The lawyer thought he was well acquainted with the lady. In fact, she knew him only casually. This particular lawyer as the type which you always have a few in every Bar, who enters the courthouse with a flourish, knows everybody, puts an arm around every female employee in the clerk's office, and tries to impress everybody with his own importance. During the argument of the case just referred to, this particular attorney winked at the lady juror. To his utter astonishment the jury returned a verdict against his client for a substantial sum of money and the lady juror was the foreman of the jury. He talked to her after the jury was discharged. She turned to him and said scornfully, "You were impertinent. You attempted to flirt with me when I scarcely knew you. I just added a few extra thousand dollars on the verdict because of your abominable conduct." While this incident does not demonstrate a logical attitude from the standpoint of justice to the litigant, its implications are clear. Ladies make good jurors. Treat them with respect and courtesy.

Also, as a defense attorney arguing a case to the jury I try to remember three rules: Don't lead with your chin; don't give your opponent anything to sink his teeth into in making his closing argument. Damage suit lawyers like nothing better than to have the defense attorney make slurring or personal references which have nothing to do with the evidence in the case so that they can crucify him in making their closing remarks. Don't get angry. It is an old trick of damage suit lawyers to needle defense attorneys all through the trial of a case. They are attempting to annoy the defense attorney to a place where he will lose his head. It is natural for a man to get angry when another man annoys him, but it is a wise man who can control his emotions and keep his powder dry when under fire. If you get angry by all means try to keep the jury from knowing that you are. Speak to the jury in a conversational tone of voice. The day of table-pounding and shaking fingers in the face of an opponent is "gone with the wind." Reason with the jury. It was the greatest of all philosophers who said, "Let us reason together." Attempt to reason with the jury. Don't lead with your chin.

There is a story told of the trial of a lawsuit in Oklahoma which may be only legendary. A case was being tried in one of the rural communities of the state, which involved the proverbial story of a railroad train striking a cow. The evidence had been concluded. The attorney for the plaintiff was a young lawyer. The attorney for the railroad was one of the distinguished and great scholars of the state. After the attorney for the plaintiff made a few remarks the railroad attorney rose to his feet and said to the jury, "This case is a simple case. It is just a plain case of *damnum absque injuria*." After he had resumed his seat the young lawyer commenced his closing argument. He said to the jury, "I am not skilled in the classics. I understand that the distinguished railroad attorney knows a great many languages. He can translate Latin into English and English into Latin. He has a conversational knowledge of many languages. I do not know very much Latin. As a school boy I attended Wapanucka High School where I studied Latin I. I will translate the phrase '*damnum absque injuria*.' '*Damnum absque injuria*'

translated from Latin into English means that it is a damn poor railroad which will kill a cow and won't pay for it." He needed to say nothing further — he won his case. There are two other stories which I like to refer to as the diamond ring stories. One of the outstanding damage-suit lawyers in our state wears a diamond ring while he is trying a jury case.

A few years ago during the trial of a damage suit the defense attorney referred to his opponents' diamond ring. He even estimated the number of carats in the diamond and said that the reason his opponent was able to buy this diamond ring was because of the unjust verdicts he wrung from juries in damage suits. The old war-horse said nothing until after the defense attorney had closed his argument. He then calmly walked in front of the jury, showed them the diamond ring and said, "I am going to explain how I acquired this beautiful ring. It so happens that I represent a number of the labor crafts in the city. It is my pleasure to counsel and advise with the laboring man. A few years ago at Christmas time the laboring men of this city took a few dollars from their pay checks and presented me with this diamond ring. I will wear it every day the balance of my life, and I do not feel that any jury will discredit me for wearing it." Defense counsel had led with his chin, and believe me, he got knocked down. The verdict of the jury was tremendous, considering the size of verdicts at that particular time.

In the second case a lawyer representing the plaintiff wore a Masonic ring with a diamond mounted in the center. The defense attorney shouted to the jury that he could not afford diamond rings and that the attorney representing the plaintiff was able to buy diamonds because of unjust verdicts he secured against defendants. He sat down. The attorney representing the plaintiff said to the jury, "I want to explain how I acquired this beautiful diamond ring." He said, "For many years I was District Judge of the District Court in another judicial district of this state. While District Judge I taught a Bible class for more than ten years over at the Baptist Church. To my utter astonishment as I was leaving the community, to move to Oklahoma City, the members of the Bible class presented me with this beautiful diamond ring. I see no harm in wearing it and really it has nothing to do with the trial of this case. It is only something for the defense attorney to grasp at like a drowning man grasping for a straw when he knows he has no defense." The mistake of the defense attorney was reflected in the size of the verdict.

Naturally defense lawyers can always have more hindsight than foresight. Trying as hard as we can, we will make some mistakes.

A blue rectangular graphic with white text. At the top, the word "CORVEL" is written in a serif font with a horizontal line underneath. Below that, the text "Your Risk Management Solution" is centered in a bold sans-serif font. Underneath, it says "Industry leading claims management and cost containment solutions." in a smaller sans-serif font. At the bottom, the contact information "(804) 418-7100 Ext. 85476" and "www.corvel.com" is listed. The bottom portion of the graphic features a pattern of white dots of varying sizes, with the text "CorVelConnected." overlaid on it.

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## Case Notes



**Stuart A. Schwartz**  
Legal Editor



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### **Christopher S. Barrett vs. Union Pacific Railroad Company**

- *FELA — General Jurisdiction — Writ of Mandamus*
- *Non-resident employee files suit in Oregon for injury occurring in Idaho*
- *UP seeks dismissal on grounds that Oregon has no jurisdiction over it in the case*
- *Court interprets U.S. Supreme Court “Daimler” decision*
- *HELD — Under U.S. Supreme Court precedent, Oregon has no general jurisdiction over UP*

In the first of three cases featured in this issue on the question of when a state court has jurisdiction to consider an FELA case brought for an out-of-state accident, the Oregon Supreme Court finds that Union Pacific’s activities within the state do not make it “at home” in Oregon and subject to its “general jurisdiction.” Therefore, the trial court cannot exercise jurisdiction over UP and the case is dismissed. The case is *Christopher S. Barrett vs. Union Pacific Railroad Company*, 2017 Ore. LEXIS 165, 361 Ore. 115. Plaintiff was represented by Douglas A. Rossi and James K. Vucinovich; Rossi Vucinovich PC, Seattle, WA and Paul S. Bovarnick, Rose Senders and Bovarnick LLC, Portland, OR. Union Pacific was represented by Wendy M. Margolis, and Julie A. Smith; Cosgrave Vergeer Kester LLP, Portland, OR. Claims handling and assistance at trial was provided by Shane Morrison, Senior Risk Management Representative, in Portland, OR. The exhaustive opinion of the court was written by Justice Kistler, and is excerpted as follows:

The primary question in this case is whether the Due Process Clause of the Fourteenth Amendment permits Oregon to exercise general jurisdiction over an interstate railroad for claims unrelated to the railroad's activities in this state. The trial court ruled that it could exercise

general jurisdiction over the railroad and denied the railroad's motion to dismiss plaintiff's negligence action for lack of personal jurisdiction. After the railroad petitioned for a writ of mandamus, we issued an alternative writ to the trial court, which adhered to its initial ruling. The case accordingly came to us for briefing and argument. We now hold that due process does not permit Oregon courts to exercise general jurisdiction over the railroad.

Plaintiff sustained injuries while working for Union Pacific Railroad Company "as a spiker machine operator near Minidoka, Idaho." According to plaintiff's complaint, the machine that he used to set spikes was in a "state of disrepair," which subjected him to "excessive vibration and jarring." Additionally, Union Pacific's decision to reduce "the spiker machine's customary three-[person] crew to a two-[person] crew" placed greater physical demands on plaintiff, causing or contributing to the injuries he suffered. As a result of Union Pacific's alleged negligent maintenance of the spiker machine and its decision to reduce the number of persons operating that machine, plaintiff suffered economic and noneconomic damages totaling approximately \$615,000.

Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska. It currently operates railroads in 23 states, including Oregon. It has been engaged in business in Oregon on an ongoing basis for a substantial period of time; one of its now-merged subsidiaries first began operating in Oregon in 1863. Oregon also forms a significant part of Union Pacific's business. The company owns approximately 32,000 miles of track in 23 states, with approximately 3.4 percent of those tracks in Oregon. In terms of the amount of track that Union Pacific owns, Oregon is thirteenth among the 23 states. Oregon is ninth in terms of employees and fourteenth among the 23 states in revenues generated.

Plaintiff brought this action in Oregon to recover for injuries that he sustained in Idaho. In response to Union Pacific's motion to dismiss for lack of personal jurisdiction, plaintiff raised essentially two arguments. First, he argued that Oregon has general jurisdiction over Union Pacific under the Federal Employers' Liability Act (FELA), 35 Stat 65, as amended, codified as 45 USC sections 51-60. Secondly, he argued that, apart from FELA, Oregon has general jurisdiction over Union Pacific because Union Pacific's actions in Oregon were "so substantial and of such a nature as to justify suit against [Union Pacific] on causes of actions arising from dealings entirely distinct from those activities."

ORCP 4 L authorizes Oregon courts to exercise personal jurisdiction over out-of-state defendants to the extent permitted by the state and federal constitutions. Union Pacific identifies no state constitutional limit on the trial court's authority to hear plaintiff's claims, and the question accordingly becomes whether due process permits Oregon to exercise general jurisdiction over Union Pacific. In answering that question, we focus initially on the court's discussion of general jurisdiction in *Daimler AG vs. Bauman*, 571 U.S. \_\_\_, 134 S Ct 746, 187 L Ed 2d 624 (2014).

The Court held in *Daimler* that California courts could not exercise general jurisdiction over Daimler AG, a German public stock company, to hear claims that were unrelated to that state. We discuss *Daimler* in greater detail below. Essentially, however, the Court explained that a corporation will be "at home" in a state and thus subject to general jurisdiction in two paradigmatic places: the corporation's place of incorporation and its principal place of business. Although the Court did not foreclose the possibility that a corporation could be "at

home" in other places, it identified a limited set of "exceptional" circumstances that will provide comparable contacts. In doing so, the Court rejected the argument that plaintiff raises here — that a substantial and continuous business presence within a state is, in and of itself, sufficient to give rise to general jurisdiction over an out-of-state corporate defendant.

In reaching those conclusions, the Court began by tracing the development of specific and general jurisdiction. The Court explained that both doctrines find their roots in *International Shoe Co. vs. Washington*, 326 U.S. 310, 66 S Ct 154, 90 L Ed 95 (1945). The plaintiff's claim in *International Shoe* arose out of the defendant's contacts with the forum state, and the question in that case was whether those in-state contacts were sufficient to give the forum state personal jurisdiction over the defendant. That type of personal jurisdiction, now called specific jurisdiction, turns on "the relationship among the defendant, the forum, and the litigation." *Daimler*, 134 S Ct at 754 (quoting *Shaffer vs. Heitner*, 433 U.S. 186, 204, 97 S Ct 2569, 53 L Ed 2d 683 (1977)). That is, specific jurisdiction "depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (alteration in original; internal quotation marks omitted).

*International Shoe* also recognized a related but separate category of personal jurisdiction, which has been labeled general jurisdiction. More specifically, *International Shoe* recognized that a foreign corporation's "continuous corporate operations within a state [may be] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." The Court did not have occasion in *International Shoe* to determine how substantial an out-of-state corporation's activities within the forum state must be before the forum could exercise general jurisdiction over the corporation. *International Shoe*, as well as most of the Court's subsequent personal jurisdiction cases, have focused instead on specific jurisdiction.

After *International Shoe* and before *Daimler*, only three of the Court's cases had considered when a foreign corporation's contacts with a forum will be sufficient to permit the forum state to exercise general jurisdiction over it. One case held that a Philippine mining company that temporarily had relocated to Ohio during the Second World War was subject to general jurisdiction in Ohio. See *Daimler*, 134 S Ct at 756 (describing *Perkins vs. Benguet Mining Co.*, 342 U.S. 437, 72 S Ct 413, 96 L Ed 485 (1952)). As the Court explained in *Daimler*, "[g]iven the wartime circumstances, Ohio could be considered a surrogate for the [mining company's] place of incorporation or head office." *Id.* at 756 n 8 (internal quotation marks omitted); see also *Goodyear*, 564 U.S. at 928 (describing *Perkins* the same way). Each of the other two cases concluded that the out-of-state defendant's occasional contacts with the forum state were insufficient to give that state general jurisdiction. *Goodyear*, 564 U.S. at 929; *Helicopteros Nacionales de Colombia vs. Hall*, 466 U.S. 408, 104 S Ct 1868, 80 L Ed 2d 404 (1984).

The Court's decision in *Goodyear* has proved notable not so much for its holding but for its explanation of when a corporation's activities within a forum state will be sufficient to give rise to general jurisdiction. The Court explained in *Goodyear* that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." 564 U.S. at 919. The Court did not define with any

specificity in *Goodyear* when a foreign corporation will be "essentially at home" in the forum state; the contacts in that case were so few that further definition was unnecessary. Rather, the task of defining when a foreign corporation will be "essentially at home" fell to *Daimler*.

On that issue, there was no dispute in *Daimler* that the German corporation's own activities in California were insufficient to permit that state to exercise general jurisdiction over it. Rather, the plaintiffs' theory (and the Ninth Circuit's holding) turned on the proposition that Mercedes Benz USA (MBUSA), Daimler's United States subsidiary, was Daimler's agent, that MBUSA's in-state activities were attributable to Daimler, and that MBUSA was subject to general jurisdiction in California—a proposition that was undisputed in that case.

In considering that theory, the Court questioned whether, even if MBUSA were Daimler's agent, its activities were attributable to Daimler (holding out the possibility that MBUSA's activities in California would be attributable to Daimler only if MBUSA were Daimler's alter ego). In a similar vein, the Court questioned whether an agent's contacts with the forum would be attributable to the principal for the purpose of establishing general jurisdiction even though those contacts would be attributable to the principal for the purpose of establishing specific jurisdiction. Finally, the Court questioned whether California could exercise general jurisdiction over MBUSA.

The Court concluded, however, that "[e]ven if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the state hardly render it at home there." In reaching that conclusion, the Court identified two paradigmatic places where a corporation will be "at home": "the place of incorporation and principal place of business." The Court did not "foreclose the possibility that in an exceptional case, *see, e.g., Perkins*," a corporation could be at home in some place other than its place of incorporation and its principal place of business. However, the Court rejected the plaintiffs' argument that a corporation will be at home "in every State in which a corporation engages in a substantial, continuous, and systematic course of business" — an argument that the Court described as "unacceptably grasping."

The Court explained why MBUSA's activities in California — even if they were imputed to Daimler and even if they were sufficient to give rise to general jurisdiction over MBUSA — were not sufficient to establish general jurisdiction over Daimler:

[T]he general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' \* \* \* General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States.\* \* \* Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . . activity' having no connection to any in-state activity.

The Court reasoned that, if MBUSA's California activities gave that state general jurisdiction over Daimler, then every other state in which MBUSA's sales were sizeable could also assert

general jurisdiction over Daimler — a result that the Court rejected as an "exorbitant exercis[e] of all-purpose jurisdiction."

Given *Daimler*, we conclude that Oregon may not exercise general jurisdiction over Union Pacific. There is no dispute that Union Pacific has engaged in a "substantial, continuous, and systematic course of business" in Oregon. However, Union Pacific's activities in Oregon, while substantial, are only a small part of its larger business activities in 23 states. To paraphrase the Court's reasoning in *Daimler*, if Oregon can exercise general jurisdiction over Union Pacific because that company's activities in this state are substantial and continuous, then every state in which Union Pacific has engaged in similar activities can assert general jurisdiction over it, and the Court was clear that a rule of decision that results in multiple jurisdictions simultaneously asserting general jurisdiction over an out-of-state defendant is at odds with the Due Process Clause.

Plaintiff, however, advances three inter-related reasons why *Daimler* does not foreclose Oregon from exercising general jurisdiction over Union Pacific. He contends initially that the touchstone of *International Shoe* is "fairness" and that there is nothing unfair in subjecting Union Pacific to general jurisdiction in a state, such as Oregon, where it has a substantial and continuous business presence. Secondly, and perhaps in support of the first point, plaintiff notes that Union Pacific employs 1,700 persons in Oregon, has an annual Oregon payroll of \$144.6 million, owns and operates almost 1,100 miles of track throughout the state, and generates over \$645 million annually in revenue from its Oregon operations. Finally, plaintiff notes that this case is factually distinguishable from *Daimler*. It does not require attributing the activities of an in-state agent to a foreign corporation to hear a claim that arose in another country, as in *Daimler*. Rather, this case focuses on Union Pacific's activities in Oregon to determine whether that company is subject to general jurisdiction in this state for an injury that resulted from Union Pacific's alleged negligence in a neighboring state.

While we appreciate the distinctions that plaintiff identifies, we are not persuaded that *Daimler* can be distinguished so easily. We agree with plaintiff that, in *International Shoe*, the Court invoked fair play as a touchstone of due process. However, since that time, the Court has refined and clarified the rules that guide our determination of when due process permits states to exercise general jurisdiction over out-of-state defendants. We cannot rely on the general invocation of fair play in *International Shoe* to undo the more specific rules for determining general jurisdiction that the Court announced in *Daimler*. Plaintiff's related point — that Union Pacific is engaged in substantial and continuous business activities in Oregon — does not provide a viable basis for distinguishing *Daimler*. In *Daimler*, the Court explicitly assumed that MBUSA's activities in California could be imputed to Daimler. Those activities included "the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers" in California. *Id.* at 764 (Sotomayor, J., concurring in the judgment). As the Court explained, however, in response to the concurring opinion, "the general jurisdiction inquiry does not focu[s] solely on the magnitude of the defendant's in-state contacts. \* \* \* General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety." Similarly, in this case, while Union Pacific's activities in Oregon are substantial, they form only a small part of its activities in the 23 states in which it operates. Viewed through the lens that *Daimler* provided, those contacts are not sufficient to confer general jurisdiction over Union Pacific. If they were, most (if not all) of the states in

which Union Pacific operates could exercise general jurisdiction over it. However, as the Court explained, due process does not permit such an "exorbitant exercise" of general jurisdiction. Section 56 consists of two sentences. The first sentence is a venue provision that defines the venues in which FELA claims may be brought in federal district courts. *See Kepner*, 314 U.S. at 50-51 (describing that sentence as conferring venue); Sen R 432 (1910), *printed in* 45 Cong Rec 4040, 4041 (stating that the first sentence in the 1910 amendment pertains to "the venue of such an action"). That sentence provides that claims under FELA can be brought in the federal district courts in three places: the district where the defendant resides, the district where the cause of action arose, or the district where the defendant was doing business when the action was commenced. *Kepner*, 314 U.S. at 50. As the Court recognized in *Kepner*, the first sentence of section 56 does not confer personal jurisdiction over out-of-state corporate defendants but instead provides for expanded venue "if there is jurisdiction." *Id.* at 51 (quoting *Hoffman vs. Foraker*, 274 U.S. 21, 23, 47 S Ct 485, 71 L Ed 905 (1927)); *accord Missouri ex rel Southern Railway Co. vs. Mayfield*, 340 U.S. 1, 3, 71 S Ct 1, 95 L Ed 3 (1950) (noting personal jurisdiction as a prerequisite to the application of section 56).

Plaintiff fares no better under the second sentence in section 56. That sentence confirms that state courts have concurrent subject matter jurisdiction over federal FELA claims. *Second Employers' Liability Cases*, 223 U.S. 1, 56, 32 S Ct 169, 56 L Ed 327 (1912). The Court explained in *Second Employers' Liability Cases* that, when Congress enacted FELA in 1908, the general jurisdictional provision giving state courts concurrent subject matter jurisdiction over federal claims was sufficient, without more, to establish the state courts' jurisdiction over those claims. The second sentence of section 56 was added to emphasize the existence of concurrent subject matter jurisdiction, but did not itself confer it. That sentence was intended to confirm the authority (and duty) of state courts to hear federal FELA claims "when [the state court's] ordinary jurisdiction as prescribed by its local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery." *Id.* at 56-57; *accord Testa vs. Katt*, 330 U.S. 386, 394, 67 S Ct 810, 91 L Ed 967 (1947) (holding that state courts generally may not refuse enforcement of federal claims if state courts would enforce the same type of state-law claims). Confirming the state courts' concurrent subject matter jurisdiction over federal claims is not the same thing as conferring personal jurisdiction over out-of-state corporate defendants. Nothing in section 56 purports to confer personal jurisdiction over out-of-state corporate defendants on state or federal courts. It is true, as plaintiff argues, that in *Kepner* the Court upheld the ability of an Ohio plaintiff injured in that state to bring an FELA claim in a New York federal district court when the basis for filing an action in that forum was that the defendant railroad was doing business there. The only issue, however, raised in *Kepner* was whether the broad venue provision in the first sentence of section 56 precluded the railroad from asserting a *forum non conveniens* defense. The railroad did not argue and the Court did not address whether a New York court could assert personal jurisdiction over a nonresident corporation for injuries that occurred in another state. A similar pattern occurred in *Miles*, on which plaintiff also relies.

Plaintiff concludes from *Kepner* and *Miles* that section 56 of FELA gave the courts in those cases personal jurisdiction over the out-of-state corporate defendants. Not only is that conclusion difficult to draw from the Court's failure to address personal jurisdiction in those cases, but it is also at odds with the history that preceded those cases. *Cf. New York Trust Co. vs. Eisner*, 256 U.S. 345, 349, 41 S Ct 506, 65 L Ed 963 (1921) (noting that "a page of history is

worth a volume of logic”). As early as 1882, the Court held that a state could assert personal jurisdiction over an out-of-state corporate defendant if the corporation was "doing business" in the state through its agent and the state served the corporate defendant's agent. *St. Clair vs. Cox*, 106 U.S. 350, 355-56, 1 S Ct 354, 27 L Ed 222 (1882). The Court reached a similar conclusion in *International Harvester vs. Kentucky*, 234 U.S. 579, 34 S Ct 944, 58 L Ed 1479 (1914), even though the corporate defendant in that case had structured its business practices to avoid complying with a state law requiring that an agent be appointed for service of process. In *Davis vs. Farmers Co-Operative Co.*, 262 U.S. 312, 316, 43 S Ct 556, 67 L Ed 996 (1923), the Court cited *International Harvester* for the proposition that the forum state had personal jurisdiction over the defendant railroad because it was doing business there. In light of *Davis*, *International Harvester*, and *St. Clair*, it should come as no surprise that the defendant railroads in *Kepner* and *Miles* did not question whether the forum had personal jurisdiction over them. In both cases, those railroads were doing business in the states in which the FELA actions were brought. Rather, the only question that the defendant railroads raised was whether venue could be transferred to a more convenient forum. The most that plaintiff can extract from *Kepner* and *Miles* is that the parties in those cases implicitly assumed that the forum states had jurisdiction because the railroads were "doing business" there. And the parties' implicit assumptions will advance plaintiff's jurisdictional arguments only if "doing business" in a forum is enough, without more, to assert general jurisdiction over an out-of-state corporate defendant. As *Daimler* makes clear, however, it is not. As explained above, the Court held in *Daimler* that the fact that an out-of-state corporation "engages in a substantial, continuous, and systematic course of business" in a state is not sufficient, in and of itself, to give that state general jurisdiction over the corporation. *Daimler* also rejected the proposition that "at home," as it used that phrase, is "synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." And the *Daimler* Court observed that, although *Perkins* had relied on two cases upholding "the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was 'doing business' in the forum," those "doing business" cases "should not attract heavy reliance today."

As we read *Daimler*, it concluded that the recognition of specific jurisdiction in *International Shoe* foreclosed reliance on older cases finding general jurisdiction based solely on "doing business" within a forum. We cannot follow the Court's decision in *Daimler* and give continued effect to the "doing business" cases that plaintiff implicitly urges us to follow, nor can we find in the terms of FELA, the cases interpreting it, or the history that preceded it a basis for saying that cases brought against railroads under that statute constitute an "exceptional" case that, like *Perkins*, will permit a court to exercise general jurisdiction over a corporate defendant in a forum other than its state of incorporation or principal place of business. We accordingly reach a different conclusion from the Montana Supreme Court, which relied on earlier "doing business" cases in upholding general jurisdiction over a railroad. See *Tyrrell vs. BNSF Railway Co.*, 373 P3d 1 (Mont 2016), *cert granted*, \_\_ U.S. \_\_ (2017). We agree instead with the majority of courts that have held that the fact that a corporation is doing business within a state is not sufficient in and of itself to give that state general jurisdiction over the corporation. See, e.g., *Brown vs. Lockheed Martin Corp.*, 814 F3d 619 (2d Cir 2016); *Kipp vs. Ski Enterprise Corp.*, 783 F3d 695, 698-99 (7th Cir 2015); *Martinez vs. Aero Caribbean*, 764 F3d 1062, 1070 (9th Cir 2014).



### Lillian Figueroa vs. BNSF Railway Company

- *FELA — General Jurisdiction — Writ of Mandamus*
- *Non-resident employee files suit in Oregon for accident occurring in Washington*
- *Plaintiff argues that appointment of registered agent by BNSF gives jurisdiction to Oregon court*
- *BNSF asserts that state's corporation law addresses only service of suit and not jurisdiction*
- *HELD — Oregon corporation law requiring appointment of registered agent does not create independent grounds for jurisdiction over "foreign corporations," case DISMISSED*

In the second of two major decisions from the Oregon Supreme Court, the court goes beyond the basic questions of general jurisdiction as addressed in *Barrett* (see previous case) and considers the issue of whether appointment by a foreign (out-of-state) corporation of a registered agent creates grounds for general jurisdiction over that corporation. The answer is “no.” Plaintiff was represented by Stephen C. Thompson and Kristen A. Chambers, Kirklin Thompson and Pope, LLP, Portland, OR. The railroad was represented by W. Michael Gillette, Sara Kobak, Noah Jarrett and Aukjen Ingraham, Schwabe, Williamson and Wyatt, P.C., Portland, OR, and Andrew S. Tulumello and Michael R. Huston of Gibson, Dunn and Crutcher LLP, Washington, DC. Claim investigation and handling by Josh Gore, Senior Claim Representative, in Spokane, WA. The full citation of the case is *Lillian Figueroa vs. BNSF Railway Company*, 2017 LEXIS Ore. 164, 361 Ore. 142. As with the *Barrett* decision, the opinion of the court is by Justice Kistler, who wrote, in part, as follows:

Oregon requires that foreign corporations doing business in this state appoint a registered agent to receive service of process ORS 60.731(1). The primary question that this case presents is whether, by appointing a registered agent in Oregon, defendant (a foreign corporation) impliedly consented to general jurisdiction here — that is, whether defendant consented to have Oregon courts adjudicate any and all claims against it regardless of whether those claims have any connection to defendant's activities in this state.

Defendant moved to dismiss this action because the trial court lacked general jurisdiction over it. When the court denied the motion, defendant petitioned for an alternative writ of mandamus. We issued the writ, the trial court adhered to its decision, and the trial court's ruling is now before us for decision. We hold, as a matter of state law, that the legislature did not intend that appointing a registered agent pursuant to ORS 60.731(1) would constitute consent to the jurisdiction of the Oregon courts.

Plaintiff was working for BNSF Railway Company in Pasco, Washington, where she was repairing a locomotive engine. To perform the repair, she had to stand on a portable stair placed on a catwalk on the locomotive. While she was reaching up to remove an engine part, the "portable stair supplied by [BNSF] rolled or kicked out from under [p]laintiff," causing her to sustain substantial injuries. Plaintiff alleged that her "injuries resulted in whole or in part from [BNSF's] negligence in failing to provide [her] with a safe place to work, and with safe tools and equipment." For the purposes of this case, we assume that those allegations are true.

BNSF is a foreign corporation. It is incorporated in Delaware and has its principal place of business in Fort Worth, Texas. Plaintiff brought this action against BNSF in Oregon to recover for the injuries that she sustained in Washington.

ORS 60.721 requires that foreign corporations doing business in Oregon maintain a registered office and appoint a registered agent in this state. ORS 60.731(1) provides that the registered agent "shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served." The parties disagree about what ORS 60.731(1) means. Relying on a 1915 Oregon case interpreting an earlier corporate registration statute, plaintiff argues that, by appointing a registered agent, BNSF impliedly consented to general jurisdiction in Oregon. BNSF responds that ORS 60.731(1) requires only that a foreign corporation designate a person in Oregon upon whom process may be served; it says nothing about jurisdiction. Alternatively, BNSF argues that, even if appointing a registered agent manifests implied consent to specific jurisdiction, it does not constitute consent to general jurisdiction. Finally, BNSF contends that requiring foreign corporations to consent to general jurisdiction as a condition of doing business in Oregon violates the federal constitution.

As noted above, our holding in this case turns on the legislature's intent in enacting ORS 60.731(1). Specifically, we conclude that appointing a registered agent to receive service of process merely designates a person upon whom process may be served. It does not constitute implied consent to the jurisdiction of the Oregon courts.

ORS 60.731(1) provides:

The registered agent appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

Textually, ORS 60.731(1) addresses service, not jurisdiction. Jurisdiction refers to the forum's authority to adjudicate claims against a defendant. *Pennoyer vs. Neff*, 95 U.S. 714, 722-23, 24 L. Ed 565 (1878). Service refers to the process by which a defendant over whom a court has jurisdiction is brought before the court. Both are necessary for a court to issue a binding judgment, but the two concepts are not synonymous.

By its terms, ORS 60.731(1) addresses only one of those concepts. ORS 60.721 requires foreign corporations doing business here to designate a registered agent in this state upon whom process may be served. ORS 60.731(1) defines the function that the registered agent serves; the agent is a person authorized to accept service of process "required or permitted by law" to be served on the corporation. The statute neither addresses jurisdiction nor equates appointing an agent for service with consent to jurisdiction in Oregon. Beyond that, ORS 60.731(1) requires that the agent be authorized to accept "any process, notice or demand *required or permitted by law* to be served upon the corporation." (Emphasis added.) As the emphasized text makes clear, ORS 60.731(1) looks to some other source of law to define which process a registered agent must be "required or permitted" to accept. If another source of law (the Fourteenth Amendment or a state long-arm statute, for instance) does not require or permit process to be served on the corporation, then ORS 60.731(1) does not provide an independent source of jurisdiction where there

otherwise would be none. Rather, ORS 60.731(1) merely requires the registered agent be authorized to accept the process that another source of law "require[s] or permit[s]" to be served upon the corporation.

In 1945, the [U.S. Supreme] Court recast the constitutional bases on which a state can exercise personal jurisdiction over nonresident defendants. See *International Shoe*, 326 U.S. at 316-19. It explained that presence within the jurisdiction was no longer a necessary prerequisite to jurisdiction over a nonresident defendant. It reasoned that, for foreign corporations, the "terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." Similarly, it recognized that "some of the decisions holding a corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents." The Court explained that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction."

The Court thus shifted the federal constitutional basis for exercising jurisdiction over foreign corporations away from conclusory terms like "presence" and legal fictions like "consent" and grounded it instead on an assessment of "the quality and nature of the [defendant's] activity [within the forum] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." As the Court explained:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

It followed, the Court explained, that courts will have specific jurisdiction "when the activities of the corporation [in the forum state] have not only been continuous and systematic, but also give rise to the liabilities sued on." The Court also recognized that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."

ORS 60.731(1) lacks the terms that persuaded this court in [*State ex rel. Kahn vs. Tazwell*, 125 Ore. 528, 266 P 238 (1928), *overruled in part on other grounds, Reeves vs. Chem Industrial Co.*, 262 Ore. 95, 100-01, 495 P2d 729 (1972)]. That section 6 of the 1903 act gave Oregon courts general jurisdiction over foreign corporations. The 1903 act directed foreign corporations to execute a written power of attorney appointing an attorney in fact as the agent for the corporation. Or Laws 1903, pp 44-45, § 6. It then provided that:

such appointment \* \* \* shall be deemed to constitute such attorney the authorized agent of such corporation \* \* \* upon whom lawful and valid service may be made of *all* writs, processes, and summons in *any* action \* \* \* in *any* court commenced \* \* \* against any such corporation, \* \* \* and *necessary to give such court complete jurisdiction thereof.*

As the court observed in *Kahn*, the terms that the 1903 legislature used were "broad and comprehensive." 125 Ore. at 538 (quoting *Ramaswamy*, 78 Ore. at 419). Not only did the 1903 act provide that appointing a registered agent for service of process would give Oregon courts "complete jurisdiction" over a foreign corporation, but it specified that it would do so "in any action \* \* \* in any court" in this state.

The current statute, by contrast, is worded more modestly. As discussed above, ORS 60.731(1) refers only to service. It omits any reference to jurisdiction, and certainly any reference to "complete jurisdiction." Indeed, because ORS 60.731(1) provides that the registered agent be authorized to accept only that process that is "required or permitted" by another law, it makes clear that ORS 60.731(1) is not itself a source of jurisdiction, as *Kahn* concluded the counterpart to section 6 of the 1903 act was.

As noted, Oregon's 1953 act requires both domestic and foreign corporations to appoint a registered agent. It also defines, in provisions that are essentially identical, the function that the registered agent serves for both domestic and foreign corporations. The 1953 act provides that a corporation's registered agent, whether appointed by a domestic or by a foreign corporation, "shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served." ORS 60.731(1) (foreign corporations); ORS 60.121(1) (domestic corporations).

Because a state already has jurisdiction over domestic corporations, there is no need to require a domestic corporation to appoint a registered agent in order to obtain jurisdiction over the corporation, nor is there any reason to assume that, in appointing such an agent, a domestic corporation impliedly consents to jurisdiction.

It follows that, when the 1953 Oregon legislature required that registered agents appointed by domestic corporations be authorized to receive "any process, notice or demand required or permitted by law to be served upon the corporation," it presumably did so for the sole purpose of having an easily identifiable person within the state upon whom process could be served. Unless the model act and the Oregon legislature intended to require an unnecessary act, requiring a domestic corporation to appoint a registered agent for receipt of service does not constitute consent to jurisdiction.

The same terms that apply to domestic corporations in ORS 60.121(1) apply to foreign corporations in ORS 60.731(1). Ordinarily, we assume that, when the legislature uses the same terms throughout a statute, those terms have the same meaning. *PGE vs. Bureau of Labor and Industries*, 317 Ore. 606, 611, 859 P2d 1143 (1993); accord ORS 60.714(1).

That is, we assume that the 1953 legislature intended that ORS 60.731(1) would serve the same purpose for foreign corporations that ORS 60.121(1) serves for domestic corporations. Both statutes require foreign and domestic corporations to designate a person upon whom process "required or permitted by law to be served upon the corporation may be served."

If the legislature intended that appointing a registered agent pursuant to ORS 60.731(1) would constitute consent to jurisdiction while appointing a registered agent pursuant to ORS 60.121(1) would not, it picked an odd way of saying so. Rather, the more reasonable inference from that context is that, under the 1953 act, neither a domestic nor a foreign corporation consents to

jurisdiction by appointing a registered agent for service of process.

For the reasons discussed above, the text and the context of ORS 60.731(1) persuade us that the 1953 Oregon legislature required domestic and foreign corporations to designate a registered agent only so that there would be an easily identifiable person on whom any process required or permitted by law to be served on the corporation could be served. The legislature did not intend that, in appointing a registered agent, a foreign corporation also would impliedly consent to the jurisdiction of the Oregon courts.

Considering the text of ORS 60.731(1) together with its context and history, we conclude, as a matter of state law, that the Oregon legislature did not intend that appointing a registered agent pursuant to that subsection would constitute consent to the jurisdiction of the Oregon courts. For the reasons set out above and in *Barrett*, the trial court erred in ruling that it had general jurisdiction over BNSF.



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Computer graphic from recent FELA case

**State ex rel. Norfolk Southern Railway Co. vs. Dolan**

- *FELA — General and Specific Jurisdiction — Writ of Prohibition*
- *Non-resident employee files suit in Missouri for out-of-state injury*
- *Plaintiff alleges general and specific jurisdiction, also says appointment of registered agent confers jurisdiction*
- *NS argues that “Daimler” dictates no general jurisdiction, also no consent to jurisdiction by appointment of registered agent*
- *HELD — “Daimler” precedent says no general jurisdiction, and no consent to jurisdiction by virtue of registered agent, case DISMISSED*

This time it is the Supreme Court of Missouri speaking to the question of jurisdiction for non-resident out-of-state FELA accidents, and it comes to the same conclusions as the Oregon Supreme Court in its *Barrett* and *Figueroa*, decisions previously reported above. Thus, no general jurisdiction and no jurisdiction based upon appointment of a registered agent. The case is *State ex rel. Norfolk Southern Railway Company vs. Hon. Colleen Dolan*, 2017 Mo. LEXIS 66. FELA plaintiff Russell Parker was represented by Edward D. Robertson Jr., Anthony L. DeWitt and Mary D. Winter of Bartimus, Frickleton and Robertson PC in Jefferson City, MO and Eric Holland and Carl Kessinger of the Holland Law Firm in St. Louis, MO. The victorious NS team consisted of Kurt E. Reitz and Erik P. Lewis, Thompson Coburn LLP in Belleville, IL, and Booker T. Shaw in the firm’s St. Louis, MO, office. Claim investigation and handling by Rodney Tatum, Manager Occupational Claims in Norfolk, VA.

Writing for the court, Justice Laura Smith said, in part:

Norfolk Southern Railway Company, a Virginia corporation, seeks a writ of prohibition directing the trial court to dismiss the underlying personal injury action brought against it under the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* Norfolk alleges Missouri has no personal jurisdiction over it where, as here, the injury occurred in Indiana to Russell Parker, an Indiana resident, as a result of his work for Norfolk in Indiana.

The underlying action is a personal injury FELA lawsuit filed in St. Louis County by Russell Parker, a resident of Indiana, against Norfolk, a Virginia corporation with its principal place of business in Virginia. Parker alleges cumulative trauma injury sustained during his years of employment with Norfolk in Indiana.

Norfolk annually complies with Missouri's foreign business registration statutes by registering with the state and designating an agent to receive service of process. [RSMo. 2000] §§ 351.574 *et seq.* Norfolk also has brought suit and been sued in Missouri courts numerous times, but only for matters arising from or related to its activities in Missouri. Parker never worked for Norfolk in Missouri. He does not allege any negligence or other conduct or omission by Norfolk in Missouri caused the injury, nor does his petition set out any basis for specific or general personal jurisdiction over Norfolk other than his statement that Norfolk conducts substantial business and owns property in Missouri. While the record shows that Norfolk's train tracks run through Missouri, it also shows that those tracks span at least 22 states, and that the portion of Norfolk's business conducted in Missouri is only about 2 percent of its nationwide business activity.

Norfolk moved to dismiss for lack of personal jurisdiction. After a hearing, the trial court overruled the motion without stating the grounds for its ruling. Norfolk then filed a petition for a writ of prohibition or, in the alternative, a writ of mandamus in the Missouri Court of Appeals. That petition was denied, and Norfolk sought the same relief in this Court. This Court issued a preliminary writ of prohibition.

Parker argues that Missouri has both general and specific jurisdiction over Norfolk and, alternatively, that Norfolk consented to personal jurisdiction by registering to do business in Missouri and appointing a Missouri agent for service of process, or that FELA confers specific personal jurisdiction over a railroad in any state where the railroad owns or operates tracks. For the reasons set out below, this Court rejects these arguments, which often inappropriately blur the distinct bases on which each type of jurisdiction is based. Because the Court finds that none of the bases for jurisdiction alleged is supported by the record, the preliminary writ is made permanent.

Personal jurisdiction is the authority of a court over the parties in a particular case. *State ex rel. Kansas City S. Ry. Co. vs. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009); *Ins. Corp. of Ireland vs. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). It is a due process requirement that limits the power of state courts over litigants. *Daimler AG vs. Bauman*, 134 S. Ct. 746, 751 (2014); *Bryant vs. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010). The basis of a court's personal jurisdiction over a corporation can be general — that is, all-purpose jurisdiction — or it can be specific — that is, conduct-linked jurisdiction. *Daimler*, 134 S. Ct. at 751. Additionally, because personal jurisdiction is an individual right, a defendant may waive jurisdictional objections by consenting to personal jurisdiction. *State ex rel. Heartland Title Servs., Inc. vs. Harrell*, 500 S.W.3d 239, 241 (Mo. banc 2016).

"When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Helicopteros Nacionales de Colombia, S.A. vs. Hall*, 466 U.S. 408, 415 n.9 (1984). In recent years, the Supreme Court has clarified the test for when the exercise of general jurisdiction over a corporation comports with due process. *Daimler*, 134 S. Ct. at 754; *Goodyear Dunlop Tires Operations, S.A. vs. Brown*, 564 U.S. 915, 919 (2011). A court normally can exercise general jurisdiction over a corporation only when the corporation's place of incorporation or its principal place of business is in the forum state. *Goodyear*, 564 U.S. at 919; *Daimler*, 134 S. Ct. at 754. In "exceptional cases," general jurisdiction may exist in an additional state if the corporation's activities in that other state are "so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 134 S. Ct. at 761 n.19.

Parker argues that Norfolk's "continuous and systematic" business in Missouri supports finding that Missouri has general jurisdiction over it even for cases not arising from its activities in Missouri. Prior to *Daimler*, this would have been a valid argument. *State ex rel. K-Mart Corp. vs. Holliger*, 986 S.W.2d 165, 168-69 (Mo. banc 1999). But, it is no longer the law. In *Daimler*, the plaintiff similarly argued a large corporation's subsidiary conducting substantial and continuous business in the state as the state's largest seller of luxury cars was sufficient to establish jurisdiction. *Daimler*, 134 S. Ct. at 752, 758. The Supreme Court expressly rejected that argument. While *Daimler* did substantial and continuous business in California, it did business throughout the United States and its California business constituted only 2.4 percent of

its total sales. The Supreme Court held that the mere conduct of these systematic and continuous business activities in the state was not sufficient to subject the corporation to general jurisdiction in the state for all causes of action not related to that state.

*Brown vs. Lockheed Martin Corp.*, 814 F.3d 619, 627-30 (2d Cir. 2016), applied *Daimler's* appraisal of a foreign corporation's forum activity to Lockheed, which was sued in Connecticut for a claim not connected in any way to its Connecticut activities. Lockheed was incorporated and had its principal place of business in Maryland, but it registered to do business in Connecticut and complied with Connecticut's registration statutes requiring designation of an in-state agent to receive service of process. Over the relevant time span, it generated approximately \$160 million in revenue and employed between 30 and 70 people per year in Connecticut; maintained a physical presence in the state, including lease of a 9,000-square-foot building for at least 15 years; carried worker's compensation insurance and defended eight lawsuits in the state during the relevant time span.

Though Lockheed's Connecticut business was substantial, it composed only a small portion of its overall business: for the relevant time period, only 0.05 percent of Lockheed's employees and no more than 0.107 percent of its total revenue came from its Connecticut activities. *Id.* at 629. The Second Circuit concluded, "Lockheed's contacts with Connecticut fall far short of the relationship that Due Process requires, under *Daimler* and *Goodyear*, to permit the exercise of general jurisdiction over Lockheed by Connecticut courts."

This analysis is directly applicable here. Norfolk owns or operates some 400 miles of track, generates approximately \$232 million in revenue, and employs some 590 people in Missouri. It has appointed a registered agent in Missouri. Yet this activity in Missouri represents a tiny portion of Norfolk's entire nationwide business. Norfolk generates only about 2 percent of its total revenues from its Missouri activities. It generates greater revenue in 11 other states. It has track in 22 states; only about 2 percent of the track it owns and 2 percent of the track it operates is in Missouri. Only about 2 percent of its total employees are in Missouri as well. Norfolk has more employees in each of 13 other states than it does in Missouri. Its Missouri contacts are insufficient to establish general jurisdiction over Norfolk in Missouri under the principles set out in *Daimler*, 134 S. Ct. at 757.

Parker notes that Norfolk has sued and been sued in Missouri courts in the past and that this constitutes a recognition of jurisdiction in Missouri courts. Parker also reiterates that Norfolk has many miles of track in Missouri and might be sued by Missouri residents, so Missouri is not an inconvenient or unexpected place for it to be sued, and, as such, Norfolk should be considered at home in Missouri.

Parker's arguments blur the distinction between general and specific jurisdiction as well as between jurisdiction and venue. The prior suits against Norfolk that Parker cites were suits based on specific jurisdiction because they concerned injuries that occurred in Missouri or arose out of Norfolk's activities in Missouri. Considerations of convenience may also have made venue appropriate in particular Missouri courts for those suits. Nonetheless, the minimum contacts that suffice to provide specific jurisdiction over such a particular Missouri-related lawsuit do not also confer general jurisdiction over a particular company for a non-Missouri-related lawsuit.

Parker notes the Supreme Court recognized in *Daimler* that, in exceptional cases, a state may have general jurisdiction over a corporation not incorporated there and that has not located its principle place of business in that state. But the Supreme Court has made it clear that to be such "an exceptional case," the forum state must be a "surrogate for place of incorporation or home office" such that the corporation is "essentially at home" in that state. *Daimler*, 134 S. Ct. at 756 n.8, 761 n.19. To find a corporation is "essentially at home" requires comparing the corporation's activities in the forum state with its activities in other states through "an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20. The Supreme Court observed that finding a corporation at home wherever it does business would destroy the distinction between general and specific jurisdiction, for "[a] corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." For this reason, when "a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case.'" *Brown*, 814 F.3d. at 629.

Here, the record shows that most of the other 21 states in which Norfolk conducts business have at least as much contact with it as does Missouri, in which only 2 percent of its business and employees are located. That this is still a large dollar amount of business does not make it a basis for finding that Missouri and these other 21 states are all "home" states for Norfolk. The nature of Norfolk's activities in Missouri are quite distinct from the "nerve-center" of activities that the Supreme Court has said might be sufficient to make a "home" state. *See Hertz Corp. vs. Friend*, 559 U.S. 77, 92 (2010). Norfolk's activities in Missouri are only a very small part of its overall activities, and not of the nature that makes Missouri its de facto principal place of business. Missouri courts may not assert general jurisdiction over Norfolk in the underlying case.

Parker also argues that Missouri has specific jurisdiction over Norfolk. Specific jurisdiction requires consideration of the "relationship among the defendant, the forum, and the litigation." *Andra vs. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 226 (Mo. banc 2015), quoting *Walden vs. Fiore*, 134 S. Ct. 1115, 1121 (2014). *Daimler* notes that specific jurisdiction "encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." 134 S. Ct. at 748-49 (internal quotation and alterations omitted). Because Norfolk has purposefully availed itself of the opportunity to do business in Missouri, it would be subject to specific jurisdiction in Missouri. But that jurisdiction would exist only over claims that are related to those contacts. *See Andra*, 453 S.W.3d at 227; *Bryant vs. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 233-34 (Mo. banc 2010). Unrelated suits can be brought in the forum only when the forum has general jurisdiction. *Id.* at 754; *Andra*, 453 S.W.3d at 227.

For the reasons already discussed, Norfolk's contacts are not sufficient to establish general jurisdiction. Only if the instant suit arises out of Norfolk's contacts with Missouri does Missouri have specific jurisdiction. Parker pleaded no facts alleging that the injury arose from Norfolk's Missouri activities. Therefore, the fact that he could sue in Missouri in a case in which the injury arose out of his contacts with Missouri does not support finding general personal jurisdiction here.

While Parker cites cases utilizing a variety of tests for determining when a specific injury "arises

from or relates to" the defendant's activity in the forum state — tests ranging from but-for causation to proximate cause — none support the proposition that, if a company is a national company that does the same "type" of business in the forum state as in the rest of the country, it can be sued anywhere. Just because a company like Ford, for example, sells cars in Iowa and in California, does not mean there is jurisdiction in California for injuries that occurred in Iowa simply because Ford engages in the same "type" of activity — selling cars — in both states. Such an argument goes even further than the pre-*Daimler* approach to *general* jurisdiction that *Daimler* rejected as providing no authority for general jurisdiction over a company. To say this same conduct confers specific jurisdiction over suits the facts of which have no relationship to the forum state would be to turn specific jurisdiction on its head. There would never be a need to discuss general jurisdiction, for every state would have specific jurisdiction over every national business corporation. Parker does not cite a single case to support his theory, which would completely do away with the distinction between general and specific jurisdiction and would undermine *Daimler's* test for general jurisdiction.

Parker further argues that FELA itself provides specific jurisdiction any place a railroad corporation has tracks. The relied-upon provision in FELA does not even purport to confer personal jurisdiction. Venue refers to where suit may be brought and not the power of the court over defendants, and the first part of the provision has long been characterized by the United States Supreme Court as "the venue provisions of [FELA]." *Pope vs. Atl. Coast Line R. Co.*, 345 U.S. 379, 380, 383 (1953). It provides:

Under this chapter *an action may be brought* in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56 (emphasis added).

The final sentence of section 56 also does not address personal jurisdiction in state court. As the United States Supreme Court has explained, that sentence addresses subject matter jurisdiction of state and federal courts over FELA suits, but it is not intended to enlarge personal jurisdiction:

[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.

*Mondou vs. N.Y., New Haven and Hartford R.R.*, 223 U.S. 1, 56-57 (1912). In other words, "FELA provides a regime of concurrent federal and state jurisdiction, . . . but this refers to subject matter jurisdiction. . . . Nothing in the act addresses the matter of personal jurisdiction in the state court." *S. Pac. Transp. Co. vs. Fox*, 609 So.2d 357, 362-63 (Miss. 1992).

Parker argues in the alternative that Norfolk consented to personal jurisdiction over any case filed against it in Missouri by complying with Missouri's foreign corporation registration

statutes, obviating the need to meet the criteria for general or specific jurisdiction. In particular, he relies on section 506.150.1(3), which provides in relevant part that service shall be had "[u]pon a domestic or foreign corporation . . . by delivering a copy. . . to any other agent authorized by appointment or required by law to receive service of process," in combination with section 351.594.1, which provides in relevant part that "[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." Parker argues that by registering to do business in Missouri and appointing a registered agent, Norfolk consented through the application of these statutes to jurisdiction in Missouri over any cause of action against Norfolk, regardless whether the cause is related to Missouri and whether Missouri otherwise would have jurisdiction over Norfolk in those suits. In support, Parker cites a pair of cases decided in 1917 and 1939, holding that registration constitutes consent.

Norfolk notes, in *Genuine Parts Company vs. Cepec*, 137 A.3d 123, 147 n.125 (Del. 2016), Delaware recently held that, as every state requires a foreign corporation doing substantial business in a state to register under the foreign corporation statutes and appoint an agent for service of process, *id.* at 125 n.1, a broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless, *id.* at 126.

Similarly, here, this Court finds there is no need to determine whether Missouri's registration statutes constitutionally could condition doing business in Missouri on consent to general jurisdiction. The extent of any consent inferred from a registration statute "is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given." *Restatement (Second) of Conflict of Laws* § 44 (1971), *comment c*. The plain language of Missouri's registration statutes does not mention consent to personal jurisdiction for unrelated claims, nor does it purport to provide an independent basis for jurisdiction over foreign corporations that register in Missouri. Rather, section 351.594.1 provides the type of service an agent for service of process can receive, stating, "The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand *required or permitted by law to be served on the foreign corporation.*" (Emphasis added). That begs the question as to what type of service is required or permitted by law on foreign corporations. Missouri permits service on resident defendants, and on a corporation's agent for service of process, section 506.150.1(3), and Missouri's long-arm statute, section 506.500, permits service on defendants for causes of action arising out of their activities in Missouri, but neither these nor other Missouri statutes provide that suit may be brought in Missouri against non-resident corporations for suits unrelated to the corporation's activities in this state. As section 351.594.1 provides only that registration is consent to service of process that Missouri requires or permits to be served on foreign corporations, the registration statute does not provide an independent basis for broadening Missouri's personal jurisdiction to include suits unrelated to the corporation's forum activities when the usual bases for general jurisdiction are not present. To the extent the holdings or dicta in prior cases suggest otherwise, they go beyond the language of the relevant statutes and should no longer be followed.



**James S. Collier et al. vs. CSX Transportation, Inc.**

- *FELA — Occupational Injury — Release — Motion to Dismiss*
- *Employee settled prior asbestos claim with release including cancer language, then sued for asbestos-related cancer*
- *CSX moved to dismiss on basis of prior release, motion granted*
- *Employee argued that Supreme Court “Ayers” decision permitted cancer lawsuit*
- *HELD — “Ayers” does not apply, “Wicker” decision says prior release covers claim, dismissal UPHELD on appeal*

Where an asbestos settlement release mentions cancer as a possible future disease resulting from the asbestos exposure covered in the settlement, the U.S. Court of Appeals for the Third Circuit says the prior release bars a subsequent FELA lawsuit for cancer. The decision is *James S. Collier and Mary Elizabeth Collier vs. CSX Transportation, Inc.*, 2016 U.S. App. LEXIS 22464. Plaintiff counsel were Robert E. Paul and Richard P. Myers, Paul, Reich, and Myers PC, Philadelphia, PA and the CSXT team consisted of Lauren E. DeBruicker and Sharon L. Caffrey, Duane Morris LLP, Philadelphia, PA, and Dan Himmelfarb and Jason R. LaFond, Mayer Brown LLP, Washington, DC. The claim was managed by Mike Scully, Director Risk Management, in Calumet City, IL. The unanimous panel opinion of the court was authored by Judge Greenberg, who wrote, in part:

On this appeal, Collier claims that the release agreement (*see below*) does not bar this action because (1) under § 5 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 55, all contracts that "enable any common carrier to exempt itself from any liability" created by that act are to that extent void, and (2) the Supreme Court decision *Norfolk and W. Ry. Co. vs. Ayers*, 538 U.S. 135, 123 S.Ct. 1210, 155 L. Ed. 2d 261 (2003), dealing with claims arising from railroad workers' exposure to asbestos precludes CSX's reliance on the release as a defense. He further contends that the District Court erred in granting CSX's Rule 12(b)(6) motion because in his complaint he made allegations that supported granting him relief. We conclude that our opinion in *Wicker vs. Conrail*, 142 F.3d 690 (3d Cir. 1998), controls on this appeal, and that the application of *Ayers* does not preserve Collier's claim. Therefore, inasmuch as the release agreement validly bars recovery by Collier in this lawsuit, we will affirm the District Court's order of dismissal entered on March 23, 2016.

Collier alleges that the facts, which we accept on this appeal, are as follows. For 17 years, from 1961 until 1978, Collier worked as a carman-welder for CSX and its predecessors-in-interest in Kentucky. Approximately 12 years after this employment, he was diagnosed with a non-malignant disease from his exposure to asbestos while he had been working for CSX. He subsequently filed suit under the FELA alleging that he was "required to work amidst excessive amounts of naphthalene, xylene, silica sand, asbestos, petroleum thinners, epoxy and urathane [sic] paints and other types of chemical contaminants and the dust particles, mist, fumes and gases of the aforementioned contaminants" which "caused him to suffer severe and permanent injury to his person."

The parties ultimately settled the foregoing suit in 1994 for \$7,500. In the settlement, in relevant part, Collier released CSX: of and from all liability for all claims for occupational disease or personal injury now known to have resulted or suspected to have resulted from [his] employment

with [CSX], and also for all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries, including cancer, arising from or contributed to by exposure to any and all toxic substances, including but not limited to, sand, silica, diesel fumes, welding fumes, coal dust, chemicals, toxic and/or pathogenic particulate matters, liquids, solids, dusts, fumes, vapors mists or gases, and exposure to and ingestion of asbestos while employed by [CSX]. The parties agree that a portion of the monies paid for in this RELEASE AGREEMENT is for risk, fear and/or possible future manifestation of either the effects of and/or injury or disease due to alleged exposure to such substances as described in this paragraph.

In 2014, Collier was diagnosed with asbestos-related lung cancer and he subsequently filed another lawsuit under FELA against CSX, the appeal from the dismissal of which is before us now. In this new action, he alleges that he "has developed symptoms due to his asbestos inhalations and injuries. [He] believes and therefore avers that his lung cancer was the result of his asbestos exposure on the railroad." CSX filed a motion to dismiss pursuant to Rule 12(b)(6) and attached to its motion a copy of the original release agreement, the 1994 complaint, and the consent order dismissing the 1994 case with prejudice. The District Court granted CSX's motion, holding that the release agreement barred Collier's claims. Collier has appealed.

The parties focus on the application of Ayers and Wicker. Collier maintains that the Supreme Court in Ayers interpreted § 5 of the FELA liberally and concluded that it "indicated a congressional intent to bar any settlement for any injury other than that which was at issue." He further asserts that "Ayers expressly ruled that if it allowed a worker to recover for the risk of cancer, that [sic] a later lawsuit for the manifestation of the cancer itself would permit a double recovery." According to his reading of Ayers, "[a]lthough the Supreme Court recognized that a railroad worker could settle a FELA claim, § 5 only permitted the worker to include known risks that flowed from the known injuries in the settlement." Further, he contends that the Supreme Court recognized that asbestos-related cancer was separate from non-malignant asbestos-related diseases.

Therefore, he argues that a settlement for exposure to asbestos could not validly cover claims for asbestos-related cancer. He also asserts that the District Court misread Wicker in holding that the release agreement was enforceable.

CSX counters that Collier did not mention Ayers in his memorandum in the District Court opposing CSX's motion for summary judgment, Ayers is irrelevant to the current case because it did not mention § 5, and the District Court properly applied Wicker.

Ayers does not provide guidance that assists us in resolving the issue before us. In Ayers, the Supreme Court addressed whether employees who developed asbestosis from exposure to asbestos while working for a railroad can recover "pain and suffering" damages under FELA because of their fear of developing cancer. The Court held that the employees could make such recoveries. But the Court did not discuss § 5, and, instead, discussed how its holding comported with the law in jurisdictions that followed the "'separate disease rule,' under which most courts have held that the statute of limitations runs separately for each asbestos-related disease" — an issue entirely unrelated to that in the present case.

Collier relies on the Ayers Court's acknowledgement that in those jurisdictions "claimants may bring a second action if cancer develops." But neither the majority opinion nor the concurring

and dissenting opinion in Ayers addressed the question of whether an employee in settling a lawsuit based on asbestos exposure can waive his or her right to bring a subsequent action based on future complications from his exposure to asbestos.

Unlike Ayers, Wicker guides our evaluation of whether § 5 of FELA prevents enforcement of the release agreement. In Wicker, we "h[e]ld that § 5 of [the] FELA allows an employer to negotiate a release of claims with an employee provided the release is limited to those risks which are known by the parties at the time the release is negotiated." In adopting this "known risks" standard, we rejected the "known injury" standard, which would "limit[] [a] release to those injuries known to the employee at the time the release is executed." Under the "known risks" standard, "a release does not violate § 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed." We recognized a limit: "Claims relating to unknown risks do not constitute 'controversies,' and may not be waived under § 5 of FELA." We adopted the known risk standard because "it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement."

We concluded in Wicker that the parties' intent was paramount in considering these provisions' enforceability. Thus, a written release is "not conclusive" in itself, and the inquiry into its validity is "fact-intensive." An employee may "attack" a boilerplate agreement that "include[s] an extensive catalog of every chemical and hazard known to railroad employment." In that decision, we also provided some guidelines for use in determining parties' intent. Thus, if a release "chronicles the scope and duration of the known risks, it would supply strong evidence in support of the release defense." But if a "specific known risk or malady is not mentioned in the release, it would seem difficult for the employer to show it was known to the employee and that he or she intended to release liability for it."

In Wicker, we acknowledged that the Supreme Court has held that the party attacking the enforceability of a release agreement bears the burden of proof, a burden that the plaintiffs met in Wicker. Wicker concerned a situation where several employees settled claims unrelated to chemical exposures that led to their later injuries. Their releases covered a broad range of exposure to chemicals. In the later cases, each employee contended either that he had not known that he had been exposed to the chemical at issue or that he was unaware that his release for back injuries also waived future chemical exposure claims. Hence, the employees were able to successfully attack the release provision's enforceability on the employer's motion for summary judgment.

Here, the undisputed documents show that the "known risks" standard has been satisfied and the release agreement is enforceable. The release including the monetary payment was given to settle the prior lawsuit. In that prior action, Collier sued in part for issues arising out of asbestos exposure. Obviously, when Collier filed suit in 1994 based on his exposure to asbestos among other contaminants, he demonstrated his knowledge that he had been exposed to asbestos. Under the "known risk" test, the issue is not, as Collier contends, whether his prior asbestos-related injury would develop into cancer — it is whether he was aware of his exposure to asbestos and the risk that the exposure could cause cancer. Therefore, contrary to Collier's contentions on this appeal, we need not consider evidence on which he relies that his prior injury is separate from

the cancer for which he seeks a recovery in determining whether cancer was a known risk when Collier settled his asbestos-related suit.

Rather, we only need consider the validity of those provisions concerning asbestos, the subject of the current suit. Notwithstanding the circumstance that the scope of the release seems fairly co-extensive with the scope of the contamination claimed in the initial complaint, as the District Court pointed out CSX is only attempting to enforce the part of the release involving cancer from exposure to asbestos. The release itself specifically mentioned cancer arising from asbestos exposure. Inasmuch as Collier demonstrated his knowledge of that exposure in filing his initial 1994 complaint and only the part of the release agreement that details that known risk is at issue here, that agreement is enforceable to defeat his asbestos-related claims.

As we have stated above, on consideration of a motion to dismiss, a court may consider unquestionably authentic exhibits in determining whether a plaintiff plausibly would be entitled to relief. Collier sued CSX based on his exposure to asbestos and settled that claim by executing a release that specifically released any claim for cancer that might arise from his work-related exposure to asbestos. Moreover, he could not plausibly claim that he did not know that cancer was a risk of asbestos exposure, and it would be implausible to conclude that he did not know of his exposure to asbestos when he settled his prior asbestos-related case. Therefore, the District Court properly dismissed this case.





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### George W. Straub IV vs. BNSF Railway Company

- *FELA — Defective Locomotive Seat — Summary Judgment*
- *Engineer sustains injury while trying to adjust seat*
- *Seat previously reported as defective, but then repaired and returned to service*
- *BNSF asserted no notice of defect which caused the injury*
- *HELD — Despite prior problem with seat, plaintiff failed to prove notice of defective condition, summary judgment GRANTED*

Even though the subject locomotive seat had been reported defective, it was repaired and then maintained in service for six months prior to plaintiff's accident, so the court says BNSF did not have the required notice of a defective condition sufficient to sustain plaintiff's FELA claim. In *George W. Straub IV vs. BNSF Railway Company*, 2017 U.S. Dist. LEXIS 5459, 2017 WL 131796, the U.S. District Court for the District of Colorado reminds us that the mere fact of a prior problem with equipment will not be enough to keep a FELA claim alive. Plaintiff's counsel was James Lee Cox, Jr., Brent Coon and Associates, P.C., Denver, CO and BNSF was represented by Chad Michael Knight, Keith M. Goman, Nadia Hafeez Patrick, Hall and Evans, LLC, Denver, Denver, CO. Assistance at trial was provided by Joseph Anderson, Senior Claim Representative, Gillette, WY. The opinion is by Judge Christine Arguello and states, in part:

Plaintiff began working for defendant on May 9, 1978, and worked as a locomotive engineer his entire career. On September 9, 2012, plaintiff attempted to adjust the locomotive engineer's seat of the train on which he was working, BNSF 6295. While in the process of adjusting the seat, plaintiff was injured when the seat stopped "abruptly and unexpectedly."

The engineer's cab seat in locomotive BNSF 6295 was installed in 2008. On March 1, 2012, a BNSF employee reported to the company that the "engineer's seat won't adjust and the foot pedal is broke." On March 22, 2012, the seat was inspected by a mechanical inspector who noted that the inspector found no issues with the seat.

From April 10 to April 13, 2012, defendant again performed an inspection of BNSF 6295, which included two inspectors testing the engineer's seat adjustment mechanism. All BNSF locomotives in regular use, including BNSF 6295, undergo routine six month inspections called M184 and M368 inspections. The records reflect that on April 10, 2012, BNSF 6295's cab operator seats were checked, which included checking the "height adjustment assembly." This was confirmed by the deposition of Beau Price who stated that during the M184 and M368 inspections, the seat's ability to move "fore and aft and lateral" is inspected. Also on April 10, 2012, Tyson Westphal, who was a cab carpenter for defendant performed a cab seat leveling inspection. Although Mr. Westphal's deposition reflects that he does not have any independent memory of his inspection of the engineer's seat on BNSF 6295, he stated that when conducting these inspections, he "run(s) though all motions of the seat, forward, back, up, down, seat tilt and back tilt to make sure everything is working properly." Following these inspections, on September 9, 2012, while attempting to adjust the locomotive engineer's seat of the train on which he was working, BNSF 6295, plaintiff was injured when the seat stopped "abruptly and unexpectedly."

Plaintiff's amended complaint advances claims for relief under the Federal Employers' Liability

Act (FELA), 45 U.S.C. § 51-60, arguing that defendant negligently failed to provide plaintiff with a safe workplace. Specifically, plaintiff claims that defendant furnished him with a defective engineer's seat adjustment mechanism, creating an unsafe risk of injury.

To establish a prima facie case under FELA, the plaintiff must prove that: (1) his injuries occurred within the scope of his employment; (2) he was employed as part of the railroad's interstate transportation business; (3) the railroad was negligent; and (4) the railroad's negligence played some part in causing the injury for which the employee seeks compensation. *Volner vs. Union Pac. R. Co.*, 509 Fed. Appx. 706 (10th Cir. 2013) (unpublished); *Van Gorder vs. Grand Trunk W. R.R.*, 509 F.3d 265, 269 (6th Cir. 2007). Under FELA, a "relaxed" standard of causation applies and the plaintiff need only demonstrate that the railroad's negligence played a part, "no matter how small," in bringing about the injury. *CSX Transp., Inc. vs. McBride*, 564 U.S. 685, 698-699, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011).

The issue in this case is whether plaintiff can establish the third element. Under the third element, a FELA plaintiff must offer evidence proving the common law elements of negligence, including duty, breach, foreseeability, and causation. *Chaffin vs. Union Pacific R. Co.*, 192 Fed. Appx. 739 (10th Cir. 2006) (unpublished) (quoting *Williams vs. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998)).

Plaintiff argues that defendant breached its duty to provide a reasonably safe workplace in four ways. First, plaintiff argues that defendant breached its duty to inspect, maintain, and repair the locomotive. In support of this argument, plaintiff alleges that there is no evidence of a M184 or M368 inspection from April 2012 through September 9, 2012, the date of plaintiff's injury. Second, plaintiff argues that defendant breached its duty to warn plaintiff of the presence of the defective condition. Third, plaintiff argues that defendant breached its duty to comply with its own rules and policies governing inspection, maintenance, and repair of its locomotives. This argument again relies on plaintiff's contention that there is no evidence of a M184 or M368 inspection of locomotive BNSF 6295. Finally, plaintiff argues that defendant breached its duty to comply with federal regulations governing the condition of its locomotive because the wall-mounted seat adjustment mechanism constitutes a component of the train and 49 C.F.R. § 229.45 provides that the locomotive "shall be free of conditions that endanger the safety of the crew," including "improper functioning of components."

Most of plaintiff's arguments rely on its argument that there is no evidence that defendant conducted a M184 or M368 inspection on BNSF 6295 between April 2012, (when a complaint was lodged about the seat on BNSF 6295) and September 9, 2012, when plaintiff was injured. Defendant, however, has submitted evidence that a M368 inspection was conducted on April 10, 2012. Further, defendant has submitted evidence that they conducted a seat leveling inspection on April 10, 2012, (which plaintiff admits) and that the seat was inspected on March 22, 2012, in response to the complaint that was lodged on March 1, 2012.

Defendant argues that there is insufficient evidence to establish that it had notice that the seat was not in a reasonably safe condition and failed to take reasonable steps to guard against it. Plaintiff contends that defendant had actual knowledge that the seat adjustment mechanism did not function properly due to the complaint on March 1, 2012. While it is certainly true that, on March 1, 2012, defendant had notice there was an issue with the seat in BNSF 6295, this is not evidence that defendant had notice that the seat remained an issue in September 2012, when

plaintiff was injured. Defendant conducted three inspections of the seat between the complaint in March and plaintiff's injury in September, and the seat passed all inspections. Thus, the knowledge defendant had was that the seat was functioning properly. *Williams*, 161 F.3d at 1062 (The employer is not liable if it has no reasonable way of knowing that a potential hazard exists.)

Plaintiff admits that there is evidence of an "Engineers Cab Seat Leveling Inspection" on April 10, 2012. Plaintiff contends, however, that there are credibility questions regarding whether or not any of the inspections were actually done and, if done, whether they were adequately performed. First, plaintiff argues that a jury could infer that the inspections were not conducted due to the fact that (1) the inspection found nothing wrong following a report that there was a problem, and (2) just five months after the inspections, on September 9, 2012, the seat again malfunctioned. Without any evidence to indicate that defendant was fabricating inspections, such a leap of logic is not grounded in reasonable inference, but rather, ventures into the realm of mere speculation. *Tenant vs. Peoria and Pekin Union Railway Co.*, 321 U.S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520 (1944) (although the court must permit all reasonable inferences to be drawn from the evidence presented, there exists an "essential requirement . . . that mere speculation be not allowed to do duty for probative facts).

Second, plaintiff argues that this Court should disregard Mr. Westphal's testimony that he checked the motions of the seat to make sure it was working properly because there is no documentation to support his testimony. Plaintiff points out that the task description concerning his seat leveling inspection does not mention the wall-mounted seat adjustment mechanism. The fact that there is no notation in the document does not lead to the conclusion that the inspection of the seat adjustment mechanism did not occur. This is not a case where there should be a notation and, thus, the documentary evidence is conspicuously missing. Further, a witness' deposition testimony is no less proof of an issue than documentary evidence. Indeed, plaintiff has provided this Court with no evidence to the contrary.

Finally, in his surreply, plaintiff submits evidence that defendant had been warned that the roller and track should not be lubricated to guard against dirt, dust, or other materials that could cause the rollers to bind up. First, this Court will not consider issues first raised in a surreply brief that could have been raised in plaintiff's response. *Stump vs. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (This court does not ordinarily review issues raised for the first time in a reply brief.) Second, although plaintiff has presented evidence that the tracks should not be lubricated, he has not presented evidence that the tracks on BNSF 6295 were lubricated prior to his injury.

Accordingly, this Court finds that plaintiff has not presented a genuine issue of fact sufficient to establish that defendant had notice that the seat was not in a reasonably safe condition and failed to take reasonable steps to guard against it, or that it was reasonably foreseeable that plaintiff could have been injured.



### **Dan Anderson vs. Union Pacific Railroad Company**

- *FELA — Jury Instructions — Motion for New Trial*
- *Plaintiff dispatcher injured when his chair collapsed, presented evidence of defective condition*
- *Plaintiff sought jury instructions allowing jury to find specific acts of negligence or no specific acts of negligence “res ipsa loquitur,” jury found both.*
- *Jury found for plaintiff, on both theories of negligence*
- *HELD — Instructions were improper, verdict REVERSED and REMANDED for new trial*

The Supreme Court of Nebraska gives us a useful reminder of the importance of proper jury instructions in *Dan Anderson vs. Union Pacific Railroad Company*, 207 Neb. 785, 2017 Neb. LEXIS 20. While this decision did not result in a dismissal of the case, it nevertheless points to the critical role of proper instructions in the trial of a lawsuit, and states the obvious conclusion that a jury cannot reach two opposite findings in the same verdict. Plaintiff was represented by Kyle J. Long, Robert G. Pahlke, and Robert O. Hippe, Robert Pahlke Law Group, Scottsbluff, NE. UP’s counsel were William M. Lamson, Jr., and Cathy S. Trent-Vilim, Lamson, Dugan and Murray, L.L.P., and Torry N. Garland, of Union Pacific Railroad Company, all at Omaha, NE. Claim investigation, handling, and assistance at trial was provided by Steven West, Jr., Risk Management Representative, in Cheyenne, WY, and Scott Shaw, Sr., Risk Management Specialist, in Cheyenne, WY. An *amicus* brief supporting the railroad’s position was contributed by Nichole S. Bogen, of Sattler and Bogen, L.L.P., Lincoln, NE, and Kathryn D. Kirmayer and Daniel Saphire, of Association of American Railroads on behalf of the AAR. The unanimous decision of the court was written by Justice Kelch, and follows, in part:

On October 2, 2007, Anderson fell to the floor while on duty as a control operator for Union Pacific when the chair in which he sat collapsed. In March 2010, Anderson brought an action against Union Pacific under FELA, asserting that permanent back injuries resulted from the fall and seeking damages. He alleged that Union Pacific was negligent in that it failed to (1) provide a safe workplace, (2) properly maintain and inspect the chair, (3) have a reasonable replacement process in place for office equipment, and (4) properly instruct its employees on how to inspect their office chairs. Union Pacific generally denied Anderson's allegations.

In June 2015, approximately 3 months before trial, the district court granted Anderson leave to amend his complaint to allege *res ipsa loquitur*. The amended complaint included the original theories of negligence and added that Union Pacific had failed to provide Anderson with a chair that was safe for the purpose for which it was used, along with a claim for *res ipsa loquitur*.

At trial, the jury heard undisputed evidence that the cause of the chair's collapse was immediately apparent after Anderson's fall: a bolt had failed. Anderson elicited expert opinion testimony that the bolt failed because the chair was routinely used outside its load limit. However, Union Pacific's expert opined that the bolt failed because it had been overtightened by the manufacturer. Both parties presented evidence that the defect in the bolt could not be seen with the naked eye and likely could not have been discovered upon an inspection by Anderson.

The jury heard evidence that before the collapse, the chair never wobbled or required repair. Anderson testified that on the day of the accident, he observed no apparent defects and believed the chair was safe to use.

The manager of terminal operations for Anderson's terminal testified that Union Pacific did not designate employees to inspect, maintain, or repair defects in the office equipment at Anderson's terminal. Instead, Union Pacific required its employees to inspect their tools and equipment, but it did not provide them with training or instruction on how to inspect office chairs. Employees reported any defects in office equipment to their manager for replacement or repair.

According to the evidence at trial, Union Pacific had "Herman Miller Aeron B" chairs, like the chair that collapsed, in several of its terminals. Union Pacific generally documented complaints about its equipment, and it received no complaints about bolt fractures occurring with that brand of chair before or after Anderson's fall, nor did Anderson himself make any kind of complaint about his chair in particular before the fall.

Union Pacific's manager of safety testified that Union Pacific had selected the "Herman Miller Aeron B" chair in 2002 based on a specific list of criteria, including a 300-pound working load limit. The manufacturer's literature limited the weight of the chair's occupants to either 270 or 300 pounds, depending on the occupant's height. Union Pacific's manager of safety also testified that regular use of the chair by individuals who exceeded its working load limit would create excess stress that could cause the chair to break before the 12-year warranty period expired. He further stated that the chair would not be appropriate for individuals who weighed more than 300 pounds and that continual use by such individuals would constitute abuse of the chair's intended use.

The manager of terminal operations, tasked with training employees to follow safety rules in Anderson's terminal, testified that at the time of Anderson's accident, he was not aware of any load limit for the chair that collapsed.

Anderson testified that Union Pacific did not inform him of a 270-pound load limit for the chair, nor was he aware of Union Pacific's informing anyone else. Anderson testified that at the time of the accident, he did not exceed the chair's load limit. Anderson estimated that three control operators probably weighed more than 300 pounds, and certainly more than 270 pounds, but he did not specifically testify that these control operators used the chair.

The district court instructed the jury on *res ipsa loquitur* and on two theories of negligence: that Union Pacific failed to provide reasonably safe equipment and that it failed to provide a safe place to work. The district court's instructions allowed for separate findings of ordinary negligence, negligence based upon *res ipsa loquitur*, or both. Union Pacific objected to the court's *res ipsa loquitur* instruction in its entirety.

The jury returned a special verdict for Anderson, finding that he had proved both specific acts of negligence causing injury and *res ipsa loquitur*. The jury awarded Anderson damages of \$920,007, which included \$266,925 for past medical expenses.

As noted above, the jury instructions allowed the jury to return a verdict making separate findings of ordinary negligence, negligence based upon *res ipsa loquitur*, or both. Union Pacific principally contends that the jury instructions were incorrect, because Anderson should not have been permitted to pursue a negligence claim simultaneously based on both specific acts of negligence and *res ipsa loquitur*. Alternatively, Union Pacific contends that the jury instructions

were prejudicial, because the special verdict form confused the jury by allowing the following inconsistent findings: (1) that Anderson proved specific acts of negligence and (2) that specific acts of negligence could not be proved. We agree with Union Pacific.

"The essence of *res ipsa loquitur* is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof." *Swierczek vs. Lynch*, 237 Neb. 469, 477, 466 N.W.2d 512, 517 (1991), quoting *McCall vs. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969). The doctrine of *res ipsa loquitur* is an exception to the general rule that negligence cannot be presumed. *McLaughlin Freight Lines vs. Gentrup*, 281 Neb. 725, 798 N.W.2d 386 (2011). *Res ipsa loquitur* is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. *Id.* See, also, *Swierczek vs. Lynch, supra* (*res ipsa loquitur* is procedural doctrine and not part of substantive law). On this point, the federal courts are in agreement that *res ipsa loquitur* is "not a rule of pleading, not a substantive rule of law, but a rule of evidence." *Ramsouer vs. Midland Valley R. Co.*, 135 F.2d 101, 106 (8th Cir. 1943). See, also, *Weigand vs. Pennsylvania Railroad Company*, 267 F.2d 281 (3d Cir. 1959). Accordingly, we shall apply Nebraska law in analyzing whether the district court erred in instructing the jury on *res ipsa loquitur*.

Whether the jury instructions given by a trial court are correct is a question of law. *United Gen. Title Ins. Co. vs. Malone*, 289 Neb. 1006, 1018, 858 N.W.2d 196, 210 (2015). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.* We have held that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of *res ipsa loquitur* does not apply. *Stahlecker vs. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003). See, also, *Bargmann vs. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998) (simply pleading specific acts of negligence in complaint will render doctrine of *res ipsa loquitur* inapplicable); *Finley vs. Brickman*, 186 Neb. 747, 186 N.W.2d 111 (1971) (if petition alleges particular acts of negligence, then plaintiff must establish specific negligence alleged, and doctrine of *res ipsa loquitur* cannot be applied). The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Long vs. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Here, Anderson pled specific acts of negligence in the operative amended complaint. Further, at trial, Anderson presented direct evidence of the cause of the chair's collapse through expert testimony that the chair collapsed because a bolt failed. Further, the expert opined that the bolt failed because users exceeded the chair's load limit over a period of time. Accordingly, the doctrine of *res ipsa* did not apply to this case.

Furthermore, the district court erred in instructing the jury on *res ipsa loquitur* in this instance. As Union Pacific notes, the jury instructions first stated that to find ordinary negligence, Anderson must prove specific acts of negligence by Union Pacific. Then, the jury was instructed that to find negligence via *res ipsa loquitur*, it had to find that Union Pacific's specific acts of negligence could not be proved. The instructions then allowed the jury to determine whether Anderson could recover under (1) ordinary negligence, (2) negligence based on *res ipsa loquitur*, or (3) *both*. Notably, within the same instruction, the jury was advised that they could return a verdict finding both (1) *that specific acts of negligence by Union Pacific had been proved* and (2)

*that specific acts of negligence could not be proved.* And the jury found that both were true. This is clearly a contradiction, and we cannot find that this did not cause confusion for the jury.

A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long vs. Hacker, supra.* If an erroneous jury instruction was prejudicial, or otherwise adversely affected a substantial right of the movant, a motion for new trial must be granted. See *Facilities Cost Mgmt. Group vs. Otoe Cty. Sch. Dist., 291 Neb. 642, 868 N.W.2d 67 (2015).* In this case, it is apparent that the res ipsa loquitur instructions' internal inconsistencies distracted the jury, which, in turn, led to the jury's inconsistent and irreconcilable verdict. Thus, the erroneous jury instructions prejudiced Union Pacific.

We conclude that the district court erred in submitting to the jury the issue of negligence based upon res ipsa loquitur and that such error prejudiced Union Pacific. We therefore vacate the verdict of the jury and remand the cause for a new trial.



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### **Lunette Young vs. Port Authority Trans-Hudson Corporation**

- *FELA — Slip and Fall — Defense Verdict*
- *Locomotive engineer slipped and fell while descending stairs*
- *At trial, plaintiff sought “res ipsa loquitur” instruction eliminating need to prove negligence*
- *PATH argued that “res ipsa” requires exclusive control of premises, no other possible cause except defendant negligence*
- *HELD — Plaintiff unable to establish required elements for “res ipsa” instruction, verdict for defendant UPHOLD*

Not a frequent occurrence, but we feature another decision discussing the concept of “res ipsa loquitur,” which, if applied, substantially eases the burden on plaintiff of winning her case. The court here, after a verdict for defendant, refuses to order a new trial on plaintiff’s argument that denial of a request for “res ipsa” instruction was error. The case is *Lunette Young vs. Port Authority Trans-Hudson Corporation*, U.S. District Court for the Southern District of New York, 2016 U.S. Dist. LEXIS 180953. Plaintiff was represented by Philip J. Dinhofer, Philip J. Dinhofer, LLC, Rockville Centre, NY and defendant PATH was represented by James M. Begley, Port Authority of New York and New Jersey, New York, NY. District Judge George B. Daniels is the author of the opinion, which reads in part:

On August 2, 2010, plaintiff Lunette Young, a PATH locomotive engineer, suffered an injury at the Hoboken, New Jersey train station. While her train was on a layover stop, plaintiff entered the terminal to use an employee bathroom. Upon leaving the bathroom, plaintiff fell while proceeding down a short staircase, injuring her foot. Plaintiff alleges that she slipped after stepping on a plastic bottle cap on the staircase. Train dispatcher Herman Jones found plaintiff at the bottom of the stairs, assisted her back to the train, and then called the PATH Police Department. PATH Police Officer Carlos Martinez interviewed the plaintiff and completed an accident report. PATH Operations Examiner Chandra Matos also spoke with the plaintiff. Eventually, plaintiff was taken by ambulance to the hospital. Two factual issues from the trial are most relevant here. First, plaintiff testified that after she tripped and while at the bottom of the stairs, she turned and saw a plastic bottle cap on the steps. She also recalled seeing that trash was overflowing from a garbage can located next to the bathroom door past the top of the staircase. On the other hand, plaintiff did not recall seeing any bottle cap or debris on the staircase or floor on her way to the bathroom. Jones also did not recall seeing garbage on the floor on the date of plaintiff’s accident, and reports prepared by Jones and Police Officer Martinez did not mention a bottle cap or contain any statement from plaintiff that she slipped on a bottle cap or debris. However, Jones testified that PATH employees had at times complained to him about the garbage can being overfilled, and on those occasions he would call an outside contractor to empty the can. Matos filed a report that quoted plaintiff as saying she “noticed the top to a water bottle on the stairs” after her fall. Chief Operations Examiner Astagne Avril also filed a report stating that plaintiff “stumbled or slipped, possibly on a bottle top/cap,” but explained at trial that he was “just relating the information [he] got from [his] supervisor.” In the same report, Avril stated that there was no unsafe condition based on photographs he reviewed of the staircase.

Plaintiff also testified that the door leading to the staircase was open on the date of the incident, and recalled seeing it open on previous occasions. Avril testified that the door was "not a security door" and that plaintiff was not injured in a "secure area." Notably, Avril testified that the door is supposed to be locked to prevent the public from using the bathroom because they have ruined it in the past. Jones testified that the door was supposed to be kept locked and accessible only to PATH employees with keys, but acknowledged that it is sometimes left open. At trial, plaintiff asked this Court to instruct the jury that defendant's negligence could be inferred under the doctrine of *res ipsa loquitur*. This Court declined that instruction for reasons stated on the record. First, this Court identified several scenarios in which plaintiff's accident could have occurred absent negligence. Second, this Court found that plaintiff had not established that plaintiff was injured in a secure area exclusively controlled by the defendant. Accordingly, this Court determined that a *res ipsa* instruction was not appropriate in this case. To establish a claim under FELA, a plaintiff must prove that: (1) the defendant is a railroad engaged in interstate commerce; (2) the plaintiff was an employee of the defendant and was acting in the course of her employment; (3) the defendant or one of its employees or agents was negligent; and (4) the plaintiff suffered an injury that resulted in whole or in part from such negligence. 45 U.S.C. § 51. "[A]n employer breaches its duty under FELA if it knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees." *Haas vs. Delaware and Hudson Ry. Co.*, 282 F. App'x 84, 87 (2d Cir. 2008) (quoting *Williams vs. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999)). "Reasonable care is determined in light of whether or not a particular danger was foreseeable." *Haas*, 282 F. App'x at 87 (quoting *Syverson vs. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994)). Foreseeability in FELA actions requires "proof of actual or constructive notice to the employer of the defective condition that caused the injury." *Sinclair vs. Long Island R.R.*, 985 F.2d 74, 77 (2d Cir. 1993).

The doctrine of *res ipsa loquitur* is appropriate in situations where, although the actual or specific cause of an accident is unknown, negligence may be inferred "merely from the happening of an event and the defendant's relation to it." *Kambat vs. St. Francis Hosp.*, 89 N.Y.2d 489, 494 (1997). "In order to prevail under a *res ipsa loquitur* theory, a plaintiff must show that '(1) the event was of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it was not due to any voluntary action or contribution on the part of the plaintiff' *Santa Maria vs. Metro-North Commuter R.R.*, 81 F.3d 265, 272 (2d Cir. 1996) (quoting *St. Paul Fire and Marine Ins. Co. vs. City of N.Y.*, 907 F.2d 299, 302 (2d Cir. 1990)); see also *Jesionowski vs. Boston and Maine R.R.*, 329 U.S. 452, 458 (1947). "The purpose of the exclusive control requirement is to eliminate within reason the possibility that the event was caused by someone other than the defendant." *St. Paul Fire*, 907 F.2d at 302. "The requirement does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." *Dermatossian vs. N.Y.C. Transit Auth.*, 67 N.Y.2d 219, 227 (1986) (internal citations and quotation marks omitted).

A *res ipsa loquitur* instruction was not appropriate in this case. To obtain such an instruction, a plaintiff has the burden of demonstrating, based on the evidence at trial, that it is reasonable to infer that the event would not occur in the ordinary course in the absence of negligence. See *Santa Maria*, 81 F.3d at 272. Here, the incident could have occurred absent negligence — for

example, if there was no bottle cap and plaintiff just slipped on the stairs, or if the bottle cap was left on the stairs only recently by a member of the public, and the jury determined that PATH utilized a reasonable cleaning schedule. Circumstantial evidence also supported defendant's position that there was no bottle cap on the stairs; for instance, plaintiff did not recall seeing a bottle cap or debris on the way to the bathroom, Jones did not recall seeing any garbage on the stairs or floor on that date, and no other witnesses or photographic evidence confirmed the presence of a bottle cap. On this record, a reasonable jury could conclude that plaintiff's accident could likely have occurred without defendant's negligence. *See, e.g., Williams vs. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 424 (2d Cir. 2004) (finding that the "'fall of an elevator' or the 'explosion of boilers' provides a stronger case for finding negligence on the basis of circumstantial evidence than does '[t]he fact . . . that a man falls down stairs'") (citing Restatement (Second) of Torts § 328D Cmt. C. (1965)) (Calabresi, J., concurring). Moreover, plaintiff did not establish another element of *res ipsa loquitur* — exclusive control. Although there was some testimony that the bathroom was intended for PATH employees who had keys, both the plaintiff and Jones acknowledged that the door leading to the staircase was sometimes left open and, more importantly, that it was open at the time of plaintiff's accident. Indeed, plaintiff concedes in her memorandum of law supporting her motion that "on this particular date the secure door by the dispatcher's office was left unlocked and propped open." Further, Avril testified that the bathroom area was not secure and reported that members of the public had used the bathroom in the past. In cases like this one, where there is ample evidence of access by the public, submitting a *res ipsa loquitur* instruction to the jury is improper. For example, in *St. Paul Fire*, 907 F.2d at 303, the Second Circuit held that the plaintiff did not establish exclusive control in light of the fact that the defendant "always" left the room unlocked and therefore "anyone with access to the seventh floor could have walked right into the room." *See also Santa Maria*, 81 F.3d at 272 (finding no exclusive control as a matter of law given third-party access to the instrument causing injury); *Dermatossian*, 67 N.Y.2d at 228 (finding that the evidence did not adequately exclude the possibility that a bus handle was broken by a member of the public). By contrast, the Court of Appeals has found that a *res ipsa loquitur* instruction was appropriate where the injury occurred in a restricted area, accessible only through a keypad-secured door. *Coale vs. Metro-N. Commuter R.R. Co.*, 621 F. App'x 13, 15 (2d Cir. 2015); *see also Potthast vs. Metro-N. R.R. Co.*, 400 F.3d 143, 145 (2d Cir. 2005) (finding that "[o]nly Metro-North employees had access" to the secure room).

Here, plaintiff did not adequately exclude the possibility that she slipped on a bottle cap left by someone other than a PATH employee, such as a member of the public who used the open door and left behind some debris on the steps. *See, e.g., De Witt Properties vs. City of N.Y.*, 44 N.Y.2d 417, 426 (1978) (proof that third parties have had access to the instrumentality generally destroys the premise, and the owner's negligence cannot be inferred); *Ebanks vs. N.Y.C. Transit Auth.*, 70 N.Y.2d 621, 623 (1987) (*res ipsa loquitur* was not appropriate because plaintiff did not adequately refute the possibility that an escalator had been damaged by a member of the public, either inadvertently or through an act of vandalism). Because plaintiff failed to establish PATH's exclusive control over the area, submission of this case to the jury on a theory of *res ipsa loquitur* was not appropriate. *See St. Paul Fire*, 907 F.2d at 304. Plaintiff's motion for post-trial relief, including for judgment as a matter of law or for a new trial, is DENIED.



### **Christopher Wardwell vs. Union Pacific Railroad Company**

- ***FELA — Motor Vehicle Accident — Defense Verdict***
- ***Conductor injured when company vehicle was rear-ended by a non-employee, non-party motorist***
- ***Plaintiff says railroad should not be allowed to argue that a third-party was the sole cause in FELA cases***
- ***HELD — No logic or legal basis for Illinois' rule denying ability to argue third-party negligence, defense verdict UPHELD***

In a decision commanded by unassailable logic, the Illinois Supreme Court overrules the practice of denying railroad defendants the ability to argue that someone else caused plaintiff's injury in FELA cases. The decision is in *Christopher Wardwell vs. Union Pacific Railroad Company*, 2017 IL 120438, 2017 Ill. LEXIS 224. Plaintiff was represented by Mark P. Dupont, Bigfork, MT and Union Pacific was represented by our friends Thomas E. Jones and Harlan A. Harla, Thompson Coburn LLP, Belleville, IL. Claims assistance at trial was provided by William Underwood, Risk Management Representative, in Saint Louis, MO. The opinion of the court is by Justice Burke, who wrote, in part:

In 2008, the plaintiff, Christopher Wardwell, was employed by the defendant, Union Pacific Railroad Company, as a switchman, brakeman, and conductor on freight trains. On August 9, 2008, plaintiff and another employee were riding in a van owned by defendant, going from a railway yard near East St. Louis to one of defendant's trains farther south. The van was being driven by defendant's agent, Regina Goodwin. While the van was heading south in the right lane of Illinois Route 3, it was rear-ended by a vehicle driven by Erin Behnken. Plaintiff suffered a severe back injury in the accident and is no longer able to perform his job duties. He is currently employed by defendant as a security guard at significantly reduced wages.

At trial, evidence was presented that, in the early morning hours of August 9, 2008, Goodwin was driving defendant's van in the left lane of Route 3, with plaintiff and another employee as passengers. After letting a truck-trailer combination go ahead of her on the right, Goodwin activated her turn signal, checked her side mirror, confirmed there was no other vehicle on her right, and then made a lane change to the right lane. At the time she made the lane change, Goodwin was not speeding or violating any traffic laws. None of the occupants of the van saw any car or any car's headlights in the right lane prior to the collision.

Approximately 20 seconds after making the lane change, defendant's van was struck from behind by a vehicle driven by Behnken. At trial, Behnken testified that she was drunk at the time of the collision, that she was arrested at the scene of the accident for driving under the influence, and that she was found to be legally intoxicated two hours later when she took a breath test. Behnken stated that she did not see the van before she hit it and that she either "fell asleep or was blacked out" prior to the collision. She did not know if she had her headlights on. Further evidence indicated that Behnken was travelling 60 to 65 miles per hour, which was 10 to 15 miles per hour over the posted speed limit. The jury, after hearing this evidence, returned a verdict in favor of defendant.

Thereafter, plaintiff filed a motion for new trial. In this motion, plaintiff alleged that defendant had improperly been allowed to argue to the jury that the sole cause of his injuries was the

negligent conduct of Behnken. According to plaintiff, this "sole-cause defense" was not permissible in a FELA action. The circuit court denied plaintiff's motion.

Although the FELA follows a general tort law framework, the statute does not incorporate the various formulations of "proximate cause" found in nonstatutory common-law actions. *CSX Transportation, Inc. vs. McBride*, 564 U.S. 685 (2011). In this context:

[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. See W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser and Keeton on Law of Torts* § 42, p. 273 (5th ed. 1984) (hereinafter *Prosser and Keeton*). "What we . . . mean by the word "proximate," one noted jurist [\*\*6] has explained, is simply this: '[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.' *Palsgraf vs. Long Island R. Co.*, 248 N. Y. 339, 352, 162 N. E. 99, 103 (1928) (Andrews, J., dissenting)." (Emphasis in original.) *CSX Transportation*, 564 U.S. at 692-93.

Thus, while a plaintiff in a FELA action must establish that a defendant's negligent conduct was a cause in fact of his injuries, he need not establish the "foreseeability" or "probability" of the injury that might be required at common law under the doctrine of "proximate cause." *Id.* at 703-04. Instead, the test "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers vs. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957). Causation issues are generally to be left to the jury which can use its "common sense" in reviewing the evidence to avoid awarding damages in "far out 'but for' scenarios." *CSX Transportation*, 564 U.S. at 704.

In this case, the jury was given instructions that correctly incorporated the FELA statutory standard on causation. Having heard the evidence, the jury returned a verdict in favor of defendant. The appellate court concluded, however, that the verdict had to be set aside because defendant was permitted to argue to the jury that the only person whose negligent conduct played a causal role in plaintiff's injuries was Behnken. We disagree.

The jury cannot make a factual determination regarding whether the defendant railroad was at least "in part" a cause of the accident, as FELA requires, if it is not allowed to consider all of the circumstances surrounding the accident, including whether another party's negligent conduct was the only negligent conduct that caused the accident. In this case, for example, Goodwin testified to the jury that she changed lanes as much as 20 seconds before the collision. Although there was conflicting evidence on this point, the jury was entitled to accept Goodwin's testimony. Based on this testimony, the jury could readily have concluded that any negligence on Goodwin's part, such as not checking her blind spot before changing lanes, did not play any part in causing plaintiff's injuries, not "even the slightest" (*Rogers*, 352 U.S. at 506). Instead, the only party whose negligent conduct caused the accident was Behnken. To hold that the jury could not even consider the role that Behnken's negligent conduct played in the accident would render the events surrounding the accident incomprehensible to the jury and, as Justice Moore noted in dissent below, "would eviscerate the standard in FELA that the railroad be a cause, at least in part, of the accident." 2016 IL App (5th) 140461, ¶ 40 (Moore, J., dissenting).

We note, too, that other courts, including the Supreme Court, have repeatedly held that, in FELA actions, the plaintiff cannot recover if his own negligence was the sole cause of his accident. *Rogers*, 352 U.S. at 504-05 (the jury was instructed to return a verdict for the respondent if it was found that negligence of the petitioner was the sole cause of his mishap); *Taylor vs. Illinois Central R.R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (citing *Southern Ry. Co. vs. Youngblood*, 286 U.S. 313, 317 (1932)). We can discern no basis for, on the one hand, denying a finding of liability when the plaintiff is the sole cause of the accident but, on the other hand, allowing a finding of liability when a third party is the sole cause of the accident. See also, e.g., *Inman vs. Baltimore and Ohio R.R. Co.*, 361 U.S. 138, 140 (1959) (implicitly recognizing that a third party drunk driver was the sole cause of an accident since any negligence "on the part of the railroad could have played no part in the petitioner's injury").

In holding that defendant could not argue that Behnken's negligent conduct was the only negligent conduct that caused the accident, the appellate court majority relied primarily on *Norfolk and Western Ry. Co. vs. Ayers*, 538 U.S. 135 (2003). In that case, the Supreme Court held that the FELA embodies the common-law doctrine of joint and several liability. This doctrine provides, as a general matter, "that when two or more defendants tortiously contribute to the same, indivisible injury, each defendant may be held jointly and severally liable for the entire injury." *Best vs. Taylor Machine Works*, 179 Ill. 2d 367, 423 (1997). Because the FELA incorporates the common law of joint and several liability, damages cannot be apportioned among multiple, concurring tortfeasors in FELA cases. Instead, when a defendant railroad is found to have caused the employee's injuries either "in whole or part," it must pay full damages to the employee and then seek contribution from the other tortfeasor. *Norfolk*, 538 U.S. at 165-66.

In this case, however, the jury concluded that defendant was *not* liable to plaintiff in the first instance. The jury determined that defendant did not cause plaintiff's injuries either "in whole or in part." Apportionment of damages was, therefore, never at issue. Plaintiff settled his claim against Behnken before trial, and the jury was properly instructed to determine whether defendant was the cause, even in the slightest, of plaintiff's injuries. At no point did defendant ask the jury to apportion damages between it and Behnken as joint tortfeasors.

Finally, plaintiff contends that the circuit court abused its discretion when it instructed the jury on defendant's sole cause defense and refused various instructions offered by plaintiff, which challenged that defense. However, we have concluded that it was permissible for the jury to consider the entirety of the circumstances surrounding the accident, including whether Behnken's negligent conduct was the only negligent conduct that caused the accident. We find no error in the circuit court's instructions.

Under FELA, the employee cannot recover unless the railroad was a cause, at least in part, of the plaintiff's injuries. In this case, after considering all the evidence, the jury agreed with defendant that it was not. There is no basis for disturbing that determination.



**Lou Montgomery et al. vs. CSX Transportation, Inc. et al.**

- *FELA — Defective Shop Equipment — Summary Judgment*
- *Machinist injured when tool cart breaks, presents expert evidence on defective equipment, inadequate safety procedures*
- *CSXT challenges expert opinion for lack of knowledge of railroad operations and safety practices, also asserts lack of evidence of negligence*
- *HELD — Expert testimony not admissible, no other evidence of negligence, summary judgment GRANTED*

When plaintiff was injured due to defective equipment in the shop, he attempted to make his case with testimony from an expert completely unfamiliar with railroad operating procedures or safety practices, but the court says his opinion is not admissible on multiple grounds and finds no other evidence of negligence such as notice of the defective condition. Summary judgment is granted to the railroad in *Lou Montgomery and Melissa Montgomery vs. CSX Transportation, Inc. and Jamco Products Inc.*, 2017 U.S. Dist. LEXIS 7299 in the U.S. District Court for the District of Maryland. Plaintiff's counsel were Lawrence A. Katz, and Michael J. Olley, Coffey Kaye Myers and Olley, Bala Cynwyd, PA. Representing CSXT were Amy E. Askew, Ryan A. Mitchell, Kramon and Graham PA, Baltimore, MD. Claim handling and assistance at trial by Paul Janssen, District Manager Risk Management, in Baltimore, MD, and Jared Rhoads, Manager Field Investigations I, in Cumberland, MD. Judge Stephanie Gallagher wrote the opinion, stating in part:

On October 5, 2013, Mr. Montgomery was working as a machinist for CSXT in its shop in Cumberland, Maryland (Cumberland shop). Mr. Montgomery had been employed as a CSXT machinist for approximately nine years. During all nine years, various tool carts were used by the machinists in the Cumberland shop. The tool carts were not all identical.

On the date of the accident, Mr. Montgomery was assigned to repair a diesel locomotive. In order to transport his tools to the locomotive, Mr. Montgomery found a tool cart and pushed it approximately 70 yards to the tool room. He placed a fuel injector on top of the cart and then pushed the tool cart another 100 yards or so to his tool locker. He went into his tool locker, retrieved a small black toolbox weighing 10 or 15 pounds, and placed it on the cart. He then went to pick up a second toolbox weighing approximately 70 to 75 pounds and set in on the cart but, when he did, the cart broke. Mr. Montgomery was jerked forward from the weight of the toolbox, and severely injured his back.

CSXT's safety rules require employees to inspect all tools and equipment for unsafe conditions before use. Mr. Montgomery looked at the cart before using it "and it appeared to be fine." He did not notice any cracks on the cart. Another CSXT employee, Mike Kennell, worked as a boilermaker in the Cumberland shop. Kennell testified that he recalled making repairs to some tool carts prior to Mr. Montgomery's accident, but he could not recall how many carts he had repaired, when the repairs were made, or whether the carts he repaired were Jamco carts. At the time of the accident, the original welds on the tool cart used by Mr. Montgomery had not been altered or repaired.

Mr. Montgomery and his wife filed the instant lawsuit against the manufacturer of the cart, Jamco, under a theory of manufacturing defect, and against CSXT, alleging negligence in violation of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, et seq. Specifically, plaintiffs allege that CSXT failed to provide Mr. Montgomery a reasonably safe place to work.

CSXT now seeks to exclude the testimony of plaintiffs' liability expert pursuant to Rule 702 of the Federal Rules of Evidence, and seeks summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs have retained Craig Clauser, P.E., as their liability expert. By plaintiffs' description, Mr. Clauser is "an expert metallurgist with a secondary expertise in industrial safety and quality control."

Mr. Clauser authored three reports regarding CSXT's liability for Mr. Montgomery's injuries — dated June 22, 2015 (first report), October 19, 2015 (supplemental report), and May 6, 2016 (rebuttal report), respectively. In the first report, Mr. Clauser opined that, "CSX Transportation failed to provide a reasonably safe work place for their employees. Once they became aware that the welds on the subject Jamco carts were defective and needed weld repairing, CSXT should have removed all of the Jamco carts from service [permanently, or repaired them prior to continued use.] Had CSX Transportation acted properly [to remove or repair the Jamco carts] . . . this incident would not have occurred and Mr. Montgomery would not have been injured." Mr. Clauser took the same position in his subsequent reports. Moreover, in his deposition and his rebuttal report, Mr. Clauser identified "near miss management theory" as the formal process underlying his opinion regarding CSXT's liability.

Mr. Clauser testified at his deposition that he considers himself an expert in "industrial accident investigation, machine guarding safety," and "the near miss management concept of safety improvement." Mr. Clauser also testified that he has been qualified as an expert in employer safety practices "maybe 50 times," but could not recall specifically being qualified as an expert in the safety practices of a railroad employer. According to his curriculum vitae, Mr. Clauser is a certified professional engineer in Pennsylvania and New Jersey, with bachelor's and master's degrees in metallurgical engineering and materials sciences. Mr. Clauser spent 15 years working in the electric and steel industries before becoming a consultant. His areas of responsibility have included material characterization, failure analysis, quality assurance, industrial accident investigation, fracture mechanics, and forensic engineering. Mr. Clauser testified that he has never worked in the railroad industry or been specifically trained in railroad industry practices. Mr. Clauser testified that the railroad industry was included in his training and coursework generally and that "[s]afety practices in a steel mill are the same safety practices in a railroad facility, [with] subtle differences."

When asked to provide the basis of his expertise in near miss management, Mr. Clauser cited his "engineering training, failure analysis and prevention, training you learn by your mistakes," as well as his "experience on how you handle a situation like [the one at issue in this case]." When asked to identify the specific rule, regulation, literature, or authority upon which he rests his opinion that near miss management theory imposes liability on CSXT, Mr. Clauser pointed to "almost any quality control book [including one by an author named Juran]," "a lot of quality assurance programs [such as] ISO 2000," and "[s]afety literature that this is an accepted part of accident prevention[.]" including "[a]rticles in the American Society of Safety Engineers

journal." In his rebuttal report, Mr. Clauser specifically mentioned a representative "peer reviewed paper in the May 2013 issue of the Journal of the American Society of Safety Engineers by Mike Williamsen titled *Near-Miss Reporting* [as] giv[ing] a good description and history of [the near miss management] safety practice." Mr. Clauser testified at his deposition that near miss management theory is taught in engineering schools, referenced in standard engineering textbooks, recommended by peer-reviewed journal articles and professional organization articles, and is a "recognized part of any good safety program" in the "safety industry[.] "When asked about his familiarity with railroad industry safety practices, Mr. Clauser stated:

The Witness: *It's my knowledge* that railroads are supposed to provide a safe workplace for their employees.

Q: And what is the basis of that knowledge?

A: That goes across the board for industry, there are OSHA requirements. There are FELA requirements. *It's just general practice in the industry to provide a safe workplace for your people.*

During the January 11, 2017, hearing on the instant motion (the hearing), plaintiffs' counsel reiterated the above foundational bases for Mr. Clauser's opinion, and did not identify additional authority on which Mr. Clauser's opinion relies.

CSXT maintains that Mr. Clauser's testimony should be excluded under Federal Rule of Evidence 702 because, "[a]lthough [he] may be qualified as a metallurgist to offer an opinion as to why the welds in the subject cart failed, he is wholly unqualified to offer opinions on railroad industry safety practices." CSXT argues that Mr. Clauser's lack of "experience within the railroad industry," lack of forensic or consulting experience or training with railroad industry practices, and lack of familiarity "with any industry standards regarding servicing tool carts," makes him unqualified to supply expert testimony in this case. "His assertion that safety practices generally are part of his metallurgic engineering background is unavailing." CSXT also claims that Mr. Clauser offers an insufficient basis for his liability opinion — erroneously relying on "general, 'across the board,' safety documents as the basis for what is required of a railroad in order to have a reasonably safe place to work[.]" rather than on highly federally regulated railroad industry standards, rules, regulations, or publications. CSXT reasons that Mr. Clauser's lack of familiarity with and failure to rely on railroad industry safety practices means that "he has not and cannot state that the near miss management theory of safety applies in the railroad industry." Consequently, CSXT urges this Court to reject Mr. Clauser's "impermissible," "because I told you so" theory of liability.

The cases cited by plaintiffs in support of Mr. Clauser's qualification to render an opinion as to the railroad industry are factually distinguishable from the instant case. Those cases each involved proffered experts with some experience in the particular industries at issue, whereas Mr. Clauser has no experience or particularized knowledge in the railroad industry or the safety practices applicable to employers who are end-users of tools. *See Friendship Heights Associates vs. Vlastimil Koubek, A.I.A.*, 785 F.2d 1154 (4th Cir. 1986) (architect and structural engineer qualified to provide expert testimony regarding standard of care owed by an architect drafting specifications for the repainting of a building); *Garrett vs. Desa Industries, Inc.*, 705 F.2d 721

(1983) (mechanical engineer experienced with components of stud drivers qualified to provide expert testimony regarding negligent manufacturing of stud drivers); *Banker Steel Co., LLC vs. Hercules Bolt Co., Inc.*, No. 10-0005, 2011 WL 1743175 (W.D. Va. May 6, 2011) (engineer experienced with application of steel industry standards qualified to provide expert testimony regarding application of said standards to facts of the case); *KBS Preowned Vehicles, LLC vs. United Financial Casualty Co.*, No. 13-138, 2014 WL 4388294 (N.D. W.Va. Sept. 5, 2014) (former truck driver, truck fleet manager, commercial auto insurance underwriter, and consultant qualified to provide expert testimony regarding cause of damage to a semi-truck). Mr. Clauser's experience in quality control for manufacturers is not helpful in establishing an employer's duties in this case.

Moreover, CSXT also challenges the insufficient basis for Mr. Clauser's opinion, which these cases do not address. While plaintiffs correctly argue that Mr. Clauser is not unqualified to deliver an expert opinion on tool carts simply because he has never worked in the railroad industry, this Court does not find that Mr. Clauser's opinion "is the product of reliable principles and methods." Fed. R. Evid. 702(c). CSXT conceded at the hearing, and the Court agrees, that near miss management is a real theory taught in schools and discussed by safety engineers in safety industry publications. However, plaintiffs have not established an adequate basis for Mr. Clauser's opinion that a railroad employer must adopt a near miss management safety standard in order to ensure a reasonably safe workplace for its employees. Mr. Clauser does not base his opinion on any government or industrywide standard incorporating near miss management theory into any acceptable safety program.

Moreover, even assuming arguendo that use of near miss management theory was required, Mr. Clauser has established no basis justifying his application of that theory to the facts of this case. According to Mr. Clauser's own testimony, mere visual inspection of these tool carts would not have revealed the internal cracks causing Mr. Montgomery's injury. Mr. Clauser therefore suggests that near miss management theory would require a more comprehensive (and presumably more expensive) analysis of all of CSXT's tool carts, potentially including a dye penetrant inspection, magnetic particle inspection, or a "proof test" to assess the sufficiency of their load bearing capacities. Again, he cites no basis for that opinion other than his own say so. The railroad does not have to be a 100% insurer of its employees' safety. *See, e.g., Brown vs. CSX Transp., Inc.*, 18 F.3d 245, 248 (4th Cir. 1994) (An employer has a duty to provide his employees a safe place to work, but this duty cannot be absolute. . . . [R]ailroads are not insurers of their employees.) (citations omitted). The exceptionally high standard of safety that Mr. Clauser attempts to impose on CSXT, a mere end-user of tool carts manufactured by another company, lacks any foundation in government regulation, industry standard, or common practice.

The absence of a discernable, reliable, independent basis supporting his opinion renders Mr. Clauser's expert opinion evidence excludable. *See Holesapple*, 5 F. App'x at 180 (requiring expert opinion evidence to be supported "by something more than the 'it is so because I say it is so' of the expert); *Daubert vs. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (concluding that, under *Daubert*, an expert opinion based on "[his] qualifications, [his] conclusions, and [his] assurances of reliability . . . [is] not enough.")

Since the Court has excluded Mr. Clauser's liability opinion as to CSXT, plaintiffs must rely on

remaining evidence to establish that CSXT failed to provide a reasonably safe workplace. Plaintiffs claim that CSXT's duty to provide a reasonably safe workplace required it to inspect and, if necessary, repair all tool carts following Mr. Kennell's repairs to some tool carts, and that CSXT breached its duty when it failed to do so. At the hearing, plaintiffs' counsel characterized CSXT's negligence as the failure to promulgate necessary safety rules and the failure of CSXT employees to report known issues to management. However, the only evidence plaintiffs presented to prove that Mr. Kennell's prior repairs of tool carts triggered the need to repair all tool carts is Mr. Clauser's now-excluded opinion. Instead, Mr. Montgomery's deposition testimony confirms that CSXT had safety policies and procedures in place that obligated employees to inspect tool carts before each use. If a tool cart was found to be unsafe, CSXT policy required employees to tag the tool cart, remove it from service, and alert a supervisor. Mr. Montgomery also testified that he followed CSXT's safety procedures on the day of the accident; he inspected the tool cart prior to using it and did not observe any unsafe conditions, such as cracks, on the cart. For his part, Mr. Kennell testified that he repaired cracked welds on an unspecified number of tool carts during an unspecified period of time, and that he did not know whether the tool carts he repaired were manufactured by Jamco or not. Mr. Kennell also stated that he did not discuss his repairs with anyone at CSXT and did not report any cracked tool carts as an unsafe condition. Plaintiffs therefore appear to suggest that CSXT had a duty to promulgate more stringent rules to require someone like Mr. Kennell to report repairs to higher management. In the absence of Mr. Clauser's testimony, there is no factual basis to establish such a duty.

In order for a jury to find CSXT liable on the basis of actual or constructive notice of the unsafe condition in the tool carts, plaintiffs necessarily invite several layers of speculation, including: that the tool carts repaired by Mr. Kennell were Jamco tool carts or carts of the same design; that the broken welds on the tool carts repaired by Mr. Kennell had the same defect as the welds on the Jamco tool cart involved in the accident; that review of all tool carts at an earlier time would have revealed an unsafe condition in the Jamco tool cart involved in this case; and that CSXT management knew or should have known about the issue with the tool carts due to Mr. Kennell's prior repairs. Simply put, the record evidence does not support any of these assumptions.

Instead, the record evidence shows that no PI-82 unsafe condition reports were filed in connection with tool carts prior to the accident, and that Mr. Montgomery denied ever filing unsafe condition reports regarding tool carts. Moreover, Mr. Kennell denied discussing his tool cart repairs with anyone at CSXT, and CSXT supervisors Michael Cornachia and Curtis Shogren denied being aware of problems with any tool carts in the Cumberland shop. There was no evidence of any prior employee injuries involving tool carts.

At the hearing, plaintiffs' counsel argued that CSXT's duty to inspect, isolate, and repair its tool carts was triggered by the "pattern" of broken welds on tool carts. However, the testimonial evidence on which plaintiffs rely does not support this assertion. As previously discussed, Mr. Kennell did not maintain repair records that would indicate the number or timing of tool cart repairs over the years, or the brand of the tool carts previously repaired. As summarized by plaintiffs, CSXT machinist Kenneth Kiser's deposition testimony reflects that "at some time before, not but right before Mr. Montgomery's accident, [Mr. Kiser] observed a cart similar to the subject Jamco cart that had all four of its legs broken as a result of broken welds. It was located in the tool bay where it would not only have been visible to Mr. Kiser, but to every

CSXT supervisor to walk through the area.” Mr. Kiser stated that he did not know how the tool cart had broken and that he did not know if the cart he saw was a Jamco cart. Even if the Court assumes that the tool cart Mr. Kiser observed was a Jamco tool cart, one tool cart with broken welds from an unknown cause does not amount to a "pattern" giving CSXT prior notice of an unsafe condition in Jamco carts. That single cart could have fallen off a truck or been hit by a locomotive. Any assumption about the cause of its broken welds is sheer speculation. Plaintiffs cannot carry their burden of proving foreseeability of harm based on the incidence of Mr. Montgomery's accident alone. *See Consolidated Rail Corp. vs. Gottshall*, 512 U.S. 532, 543 (FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.') (citation omitted). Nor can plaintiffs make their case on inferences based on guess work. *See, e.g., Deans*, 152 F.3d at 330 (affirming summary judgment where a FELA plaintiff's claim of negligence "rests on mere speculation and conjecture") (citing *Sylvia Dev. Corp. vs. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir. 1995) ('[I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence.

Permissible inference must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.'). Plaintiffs have failed to present evidence that CSXT or its supervisors had actual or constructive notice that welds with internal cracks on Jamco tool carts posed a safety hazard to its employees who used the carts. Consequently, the Court finds that plaintiffs have failed to demonstrate reasonable foreseeability of harm. Summary judgment is therefore warranted as to plaintiffs' claims against CSXT.

For the reasons set forth above, defendant CSXT's Motion to Exclude Expert Testimony and Motion for Summary Judgment is GRANTED.



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### **Edward Blackorby vs. BNSF Railway Company**

- *FRSA — Employee discipline — Appeal of Verdict*
- *BNSF employee disciplined after filing injury report*
- *Employee argued for liability so long as railroad's action had a retaliatory effect, trial court agreed*
- *BNSF says plaintiff should be required to prove retaliatory intent*
- *HELD — FRSA requires employee to prove that railroad's discipline was intentional retaliation for filing injury report, REVERSED and REMANDED for new trial*

Because an increasing number of employee injury FELA claims are coupled with claims of retaliatory discipline under the Federal Railroad Safety Act, sec. 20109, we are now initiating coverage of FRSA cases in hopes of providing guidance to our readers. In the first of two cases from the U.S. Court of Appeals for the Eighth Circuit we will present in this issue, *Edward Blackorby vs. BNSF Railway Company*, 2017 U.S. App. LEXIS 3462, the court stated its view that controlling Eighth Circuit precedent requires the jury to be instructed that intentional retaliation must be proved. While the court returned the case to the lower court for a new trial on whether that burden had been met, the importance of this case is in its pronouncement that intent is a central element in the trial of FRSA cases. It should also be noted that the U.S. Department of Labor filed an *amicus* brief in support of plaintiff's unsuccessful argument. Plaintiff is represented by Jeff R. Dingwall, Eight and Sand, San Diego, CA; Charles Kiel Garella, Garella Law PC, Charlotte, NC; Erica Mynarich, Carver and Cantin, Springfield, MO. BNSF is represented by Kendall Paul Day, Jack D. Rowe, Lathrop and Gage, Kansas City, MO; Bryan P. Neal, Thompson and Knight, Dallas, TX; David M. Pryor, BNSF Law Department, Ft. Worth, TX. The unanimous panel opinion is by Judge Melloy, and reads in part, as follows:

BNSF Railway Company (BNSF) disciplined its employee, Edward Blackorby, for not promptly reporting a workplace injury. Blackorby sued, claiming BNSF's discipline violated the employee-protections provision of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109(a)(4). The case went before a jury, and after the close of evidence, the jury was instructed that Blackorby need not establish intentional retaliation to prevail on his claim. The jury found for Blackorby and awarded him damages for emotional distress. Because we conclude that this Court's decision in *Kuduk vs. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014), required Blackorby to establish intentional retaliation and that the jury instructions did not compel such a finding, we reverse and remand.

Blackorby worked on a traveling steel gang that repaired and maintained track for BNSF. While working on a dusty, windy day, Blackorby began to experience discomfort in his right eye. After work, Blackorby told a union foreman that he thought something had entered his eye, and the foreman recommended saline drops. The drops soothed Blackorby's eye, but it still felt "scratchy." Two days after the discomfort began, Blackorby had an unrelated root canal, the dentist gave him pain pills, and he went home to bed. When Blackorby woke up on the third day, he noticed his eye had begun to swell. By the fourth day, a Sunday, Blackorby's eye had significantly worsened. He went to the only place he thought an eye doctor would be available on a Sunday: a mall LensCrafters. There, a doctor removed a small metallic object from the surface of Blackorby's cornea.

Under Rule 1.2.5 of BNSF's Maintenance of Way Operating Rules, "[a]ll cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed." The rule further provides that "[i]f an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager."

Accordingly, Blackorby called Assistant Roadmaster Douglas Turney, a BNSF manager, immediately after the doctor removed the object from his eye. Blackorby told Turney that an object entered his eye at work, that a doctor removed the object, and that he had a follow-up appointment with the doctor the next day. Turney then relayed this information to James Sadler, also a BNSF manager. Sadler asked to accompany Blackorby to his follow-up appointment. Blackorby called his union representative, and the representative said it would be fine if Sadler went to the doctor's appointment so long as Sadler did not go into the examining room or ask for Blackorby's records. As a result, Blackorby acquiesced to Sadler's request, but he did not "feel comfortable" with Sadler coming to his appointment.

The next day, Blackorby went to his follow-up appointment and learned that his eye would be okay. After receiving the good news, Blackorby walked out to the lobby of the LensCrafters where Sadler was waiting. According to Blackorby, Sadler asked him if he wanted to formally report the injury. Blackorby said he did want to report the injury, but Sadler "was kind of adamant on [Blackorby] not reporting it." Sadler told him that Blackorby "didn't have to say it happened at work," and that he "could say it happened at home or . . . say it happened somewhere else if [Blackorby] felt comfortable with that." Blackorby asked whether he would "have to go through an investigation" if he reported the injury. Sadler said that he "hated investigations, [and] he'd rather not have them." Nevertheless, Sadler said "it was up to [Blackorby] to decide whether to formally report the injury."

Blackorby "was pretty upset" about the conversation with Sadler and called Turney to make clear that he wanted to file a formal injury report. Although Turney already knew about Blackorby's injury, Blackorby felt the need to make the phone call because he "didn't know what [Sadler's] intention was." During this phone call, Turney told Blackorby that it would be "late reporting" if Blackorby reported the injury. Blackorby felt like Turney and Sadler "were discouraging [him] from reporting."

Six days after Blackorby first began experiencing discomfort in his eye, he filed his formal injury report. Soon after, Blackorby received a letter informing him that he was being investigated by BNSF. He "wasn't too happy" about the letter. He did not think his injury was reported late because he had immediately told Turney about the injury after the doctor discovered the metal in his eye. According to Blackorby, he would have reported the injury the day he began experiencing discomfort if he had known at the time he had metal in his eye.

After an investigation and hearing, Sadler determined that Blackorby had violated Rule 1.2.5. Accordingly, Blackorby received a Level S (Serious), 30-Day Record Suspension and a one-year probationary period. The effect of this discipline was that Blackorby faced a 30-day suspension without pay if he committed another rule violation during the one-year probationary period.

Blackorby did not ultimately receive any time off without pay as a result of his Record Suspension. In the meantime, however, Blackorby appealed the discipline within BNSF. Blackorby then filed a complaint with the Occupational Health and Safety Administration, which issued findings that BNSF violated Blackorby's rights under the FRSA. These findings were

challenged before an administrative law judge, but while the challenge was still pending, Blackorby filed the present action in federal district court for de novo review pursuant to 49 U.S.C. § 20109(d)(3).

After the close of evidence, the district court instructed the jury on the elements of Blackorby's FRSA claim. The jury was instructed that "Blackorby is not required to show that the defendant had a retaliatory motive but such motive will prove a violation of [the FRSA] if it contributed or tended to affect in any way the outcome of the decision to take adverse action."

The jury returned a verdict for Blackorby, awarding him \$58,280 in damages for emotional distress. The district court denied BNSF's motion for judgment as a matter of law, denied BNSF's motion for a new trial, and awarded costs and attorneys' fees to Blackorby. BNSF now appeals.

The FRSA's employee-protections provision protects certain acts by railroad employees. See 49 U.S.C. § 20109(a). It provides that "[a] railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done . . . (4) to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness." *Id.* To establish a prima facie case under the employee-protections provision, an employee must show "(i) he engaged in a protected activity; (ii) [the railroad carrier] knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action." *Kuduk*, 768 F.3d at 789 (citing 49 U.S.C. § 42121(b)(2)(B)(i)); see also 49 U.S.C. § 20109(d)(2) (incorporating into the FRSA the standards and burdens of proof set forth under 49 U.S.C. § 42121(b)).

In the present case, the parties dispute whether the contributing-factor causation standard required Blackorby to show that BNSF intentionally retaliated against him for reporting his injury. Blackorby and the United States (as *amicus curiae*) both urge this Court to follow *Araujo vs. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013). In *Araujo*, the Third Circuit considered whether an employee's injury report was a contributing factor to his discipline. The court noted that "the term 'contributing factor' is a term of art that has been elaborated upon in the context of other whistleblower statutes." The court stated that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of [the employer's] decision."

This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor." (emphasis omitted) (quoting *Marano vs. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); see also 135 Cong. Rec. 5033 (1989) (using the same language to explain why Congress incorporated the contributing-factor standard into the Whistleblower Protection Act). The court further noted that, in the context of other whistleblower statutes employing the contributing-factor standard, "an employee *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Araujo*, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1141).

The Third Circuit extended this interpretation of the contributing-factor standard to the FRSA's employee-protections provision. In so doing, the court noted that the contributing-factor

standard was incorporated into the FRSA in 2007 after Congress examined systemic problems in the railroad industry. The court explained that "the House Committee on Transportation and Infrastructure held a hearing to 'examine allegations . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job injuries.'" (alteration in original) (quoting *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transp. and Infrastructure, 110th Cong. at v (2007)* (memorandum from Committee's Majority Staff)). The court noted congressional concern that "the underreporting of railroad employee injuries has long been a particular problem." (quoting *Impact of Railroad Injury, 110th Cong. at vi*). And the court noted concerns "that some railroad supervisors intimidated employees from reporting injuries to the [Federal Railroad Administration (FRA)], in part, because their compensation depended on low numbers of FRA-reportable injuries within their supervisory area." Citing this problematic history of injury reporting and railroad programs, the court reasoned that Congress incorporated the contributing-factor standard into the FRSA in order to "reduce[ ] an employee's burden in making a prima facie case." According to the Araujo court, this reduced burden meant--consistent with whistleblower statutes using the contributing-factor standard--that "an employee need not ascribe motive to the employer."

BNSF, however, argues that this Court has already rejected Araujo. In *Kuduk*, we considered whether, under the FRSA, an employee established a prima facie case that BNSF terminated the employee for his safety report. In that case, a supervisor, who was aware of the employee's prior safety report, reported the employee for walking between the rails--a serious violation of BNSF rules.

Because the employee already had other serious violations on his record, the employee was discharged by BNSF. Relying on Araujo and a "cat's paw" theory of causation, the employee argued that, because the supervisor knew about the employee's safety report and because it was disputed whether the employee even violated BNSF rules, the employee had established that the safety report was a contributing factor to the supervisor reporting the employee. The *Kuduk* court, however, disagreed.

The court concluded that "the contributing factor that an employee must prove is *intentional retaliation* prompted by the employee engaging in protected activity." (emphasis added). The court then noted that there was no evidence to suggest that the supervisor reacted negatively to the safety report. Further, the court noted that there was no evidence that the BNSF manager who actually disciplined the plaintiff knew about the safety report and, therefore, affirmed the district court's grant of summary judgment to BNSF.

We find *Kuduk* controlling. The court reasoned from the general language of the statute that the "essence" of the FRSA's employee-protections provision is "discriminatory animus." (quoting *Staub vs. Proctor Hosp.*, 562 U.S. 411, 1193 (2011)). And, in a footnote, the court expressly rejected the Araujo conclusion which Blackorby now urges this panel to adopt. (In our view, the Araujo panel may have improperly relied on *Marano* . . . for its no-need-to-show-motive conclusion because the court in *Marano* was construing a federal employee whistleblower statute that required only an ultimate showing of causation in fact ("because of"), not discrimination.)

Accordingly, regardless of whether we find Araujo persuasive, we are bound to follow *Kuduk*. See *United States vs. Anderson*, 771 F.3d 1064, 1066 (8th Cir. 2014) ([I]t is a cardinal rule in our

circuit that one panel is bound by the decision of a prior panel." (alteration in the original) (quoting *United States vs. Betcher*, 534 F.3d 820, 823 (8th Cir. 2008)).<sup>1</sup>

Because we find no plausible way for this panel to distinguish Kuduk's conclusion that a showing of intentional retaliation is required under the FRSA's employee-protections provision, we hold that the district court abused its discretion when it instructed the jury that Blackorby need not establish intentional retaliation. "Taken as a whole," the instruction did not "fairly and adequately represent" the law in this Circuit. See *McCoy*, 593 F.3d at 744 (quoting *Brown*, 284 F.3d at 953).

Under Kuduk, a jury must find intentional retaliation prompted, at least in part, by the protected activity. The jury instruction in the present case did not require the jury to make such a finding.

Under Kuduk, a plaintiff must establish intentional retaliation to prevail on an FRSA claim. Because the instruction in this case did not require the jury to make such a finding, we reverse and remand for proceedings consistent with this opinion.



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### **Kelly Heim vs. BNSF Railway Company**

- *FRSA — Employee Discipline — Summary Judgment*
- *Trackman files injury report for work-related injury, then suffers discipline for unsafe work activity*
- *Employee alleges discipline was retaliation for reporting injury*
- *BNSF says safety violation was sufficient grounds for discipline*
- *HELD — No evidence of intentional retaliation, summary judgment GRANTED*

In the second of two cases decided by the same panel of the U.S. Court of Appeals for the Eighth Circuit, BNSF is found not liable because plaintiff presented no evidence that the railroad intended to retaliate against him for sustaining an on-the-job injury. Further, the court held that a compensation program for management employees that included a “reportable injury” component was not sufficient grounds to support a claim for intentional retaliation. This case is *Kelly Heim vs. BNSF Railway Company*, 2017 U.S. App. LEXIS 3460, and because the holding here and in *Blackorby* conflicts with the holding of another circuit court, the likelihood of eventual consideration by the U.S. Supreme Court is increased. Mr. Heim was represented by Adam W. Hansen, Apollo Law LLC, Minneapolis, MN; Russell A. Ingebritson, Ingebritson and Associates, Minneapolis, MN; John P. Inserra, Inserra and Kelley, Omaha, NE; James H. Kaster, Lucas Kaster, Matthew H. Morgan, Nick Thompson, Nichols and Kaster, Minneapolis, MN. BNSF’s counsel were Katherine Q. Martz, Thomas C. Sattler, Sattler and Bogen, Lincoln, NE; and Bryan P. Neal, Micah Randall Prude, Thompson and Knight, Dallas, TX. Once again, the panel’s decision was unanimous and the opinion was written by Judge Melloy, who stated in part:

On the day of his injury, Heim was working as part of a section gang near Douglas, Wyoming. The section gang was responsible for replacing worn material underneath the rail. This process, known as “rail seat abrasion,” requires de-clipping and swinging the rail into the center of the track. The loose rail, however, remains under tension, and there is a risk that it may roll or tip unpredictably. During a morning safety briefing, the gang was allegedly warned of this risk and instructed to remain out of the “danger zone.” The danger zone is the area between the loose and fixed rail. In this zone, the loose rail could move and pinch a worker against a fixed rail. Loose rail tends to tip towards fixed rail, but can tip either way. No BNSF rule directly prohibits employees from stepping into the danger zone, but general BNSF rules require employees to take precautions to avoid injury.

At the time of his injury, Heim was responsible for picking up “other track material” (e.g., clips, spikes, and anchors). BNSF workers pick up these materials because they may pose a tripping hazard or get “tamped into the ballast.” While performing this task, Heim noticed a stray rail clip in the danger zone. According to Heim, the loose rail was sitting flat at the time and did not appear to be moving. He looked both ways to locate the nearest on-track machines and, believing it was safe under the circumstances, stepped between the loose and fixed rails to retrieve the clip. After Heim did so, the loose rail jumped onto his left foot, fracturing it. The rail pinned Heim's foot to the ground, but the rail did not pinch him against the fixed rail--the “danger” typically associated with the danger zone. Heim called out to his coworkers for help,

and after the rail was finally removed from his foot 30 minutes later, Heim was transported to the hospital.

According to Heim, his immediate supervisor, Jim White, pressured him into filling out a formal personal injury report at the hospital. Heim did not want to fill out the form at the time because he had taken prescription pain medication. White, however, "insisted that it needed to be filled out right then and there." When Heim filled out the report and checked the box indicating that the injury was caused by the conduct of another person, White "coached" Heim to change his answer. Heim acquiesced, scratching out his original answer and indicating that the injury was not caused by another person. Heim also wrote that he could have prevented the injury by picking up the clip from the other side of the rail or leaving the clip until he could retrieve it later.

One week after Heim's injury, he received a notice of investigation from BNSF. The notice requested that Heim attend a hearing to determine "his responsibility, if any, in connection with [his] alleged failure to comply with instructions given at the morning briefing and failure to be alert and attentive when [he] placed his foot in harms [*sic*] way between the loose rail and fixed rail." At the hearing, Heim stated that he believed it was safe to step between the rail under the circumstances and that he could not have prevented the injury without also failing to perform his job that day (*i.e.*, remove debris from the track). A BNSF Division Engineer, Samuel Turnbull, reviewed the transcript from the hearing and determined that Heim violated BNSF rules requiring employees to be alert, attentive, and careful to prevent injury. As a result, Heim was given a Level S (Serious), 30-Day Record Suspension and a one-year probationary period. The effect of this discipline was that Heim faced a 30-day suspension without pay if he committed another rule violation during the one-year probationary period. Heim ultimately did not receive any time off without pay as a result of his Record Suspension.

Heim filed suit against BNSF, claiming that its discipline violated the FRSA. In his discovery deposition, Turnbull testified that he was "probably guilty" of stepping too close to the loose rail himself, and that "there probably isn't an engineering employee out on the track that at one point in time has not either stepped that close [to loose rail] or seen somebody do it." Turnbull, however, stated that he was not aware of any other employee in his "territory" who had been disciplined for stepping too close to loose rail. He also stated that he had never personally set up an investigation for such a violation. But, according to Turnbull, Heim's incident warranted discipline because it was a "pretty significant event" due to Heim's injury.

Additionally, Turnbull, White, and a BNSF corporate representative testified about a BNSF incentive compensation program. BNSF's corporate representative testified that 15% of the compensation program depended upon meeting or exceeding BNSF goals for reducing injuries reportable to the Federal Railroad Administration. The representative further testified that this component of the compensation program is important to incentivize employees to have "processes, such as [a] safety action plan . . . that are going to reduce and eliminate injury, pain, and suffering." Turnbull testified that his bonus from the compensation program is based on the number of injuries reported company-wide, not the number of injuries reported under individual managers. He stated, "I could have zero [injuries] and the next guy could have 10 and it makes no difference, everybody is going to get the same. But at the local level you're also evaluated on your safety and it's not based off the number of injuries. It's based off of what you're doing to change behaviors, what you're doing to fix the environment[.]" Further, Turnbull and White both

testified that they had been trained not to retaliate against employees for reporting injuries, and White testified that he has witnessed a coworker fired for such retaliation.

Under the FRSA, "[a] railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done . . . (4) to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness." 49 U.S.C. § 20109(a). To establish a prima facie case under this section, an employee must show "(i) he engaged in a protected activity; (ii) [the railroad carrier] knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action." *Kuduk vs. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014).

In the present case, Heim contends that he was disciplined for suffering an injury, not because he stepped near the loose rail. As evidence, he points to Turnbull's comments that others have not been disciplined for stepping near loose rail and that Heim's injury is what made his violation different. Thus, because Turnbull would not have learned about the violation without the injury report and because there would have been no injury report without Heim's injury, Heim argues that his injury report is "inextricably intertwined" with his discipline. According to Heim, this factual connection, without more, is sufficient to establish the contributing-factor element of his prima facie case. See *Ray vs. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 888 (S.D. Iowa 2013) (Under these circumstances . . . , plaintiff has demonstrated a genuine issue of material fact as to whether his protected activity was a contributing factor in his termination . . . because plaintiff's report is *inextricably intertwined* with the adverse employment action." (emphasis added).

But this Court has previously held that, under the FRSA's employee-protections provision, "the contributing factor . . . an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Kuduk*, 768 F.3d at 791. For the reasons set forth in our opinion issued today in *Blackorby vs. BNSF Railway Co.*, No.15-3192, slip op. at 8-10 (8th Cir. Feb. 27, 2017), we are bound to follow *Kuduk*. Heim therefore must demonstrate more than a mere factual connection between his injury report and his discipline in order to establish a prima facie case under the contributing-factor standard. Heim need not "conclusively demonstrate [BNSF's] retaliatory motive" to establish a prima facie case, but he must demonstrate that BNSF's discipline was, at least in part, intentional retaliation prompted by his injury report. See *Kuduk*, 768 F.3d at 791 (quoting *Coppinger-Martin vs. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)).

Viewing the evidence in the light most favorable to Heim, we conclude that no reasonable factfinder could conclude that Heim's supervisors intentionally retaliated against him for filing his injury report. To start, there is no dispute that White requested Heim submit a formal injury report. On the contrary, Heim contends that White *pressured* him to fill out the report. The remaining evidence, moreover, is insufficient to suggest that Turnbull intentionally retaliated against Heim. While the *Kuduk* court "acknowledge[d] that the more lenient 'contributing factor' standard will increase to some extent the probative value of temporal proximity," it also "reject[ed] the notion . . . that temporal proximity, without more, is sufficient to establish a prima facie case" under the FRSA. We conclude that BNSF's compensation program is insufficient, by itself, to provide the "more" necessary for Heim's claim to survive summary judgment; the record demonstrates that bonus calculations are based on a company-wide reduction of

reportable injuries and not based on reportable injuries under individual managers like Turnbull. And Turnbull's alleged admission that the rules were selectively enforced against Heim is likewise insufficient. Although Turnbull admitted that most employees have probably stepped too close to loose rail and were not disciplined, we agree with the district court that, unless they were injured like Heim, their violations most likely "would have gone unnoticed." Therefore, without more specific evidence of an improper retaliatory motive, we find that Heim failed to establish his prima facie case.

The judgment of the district court is affirmed.



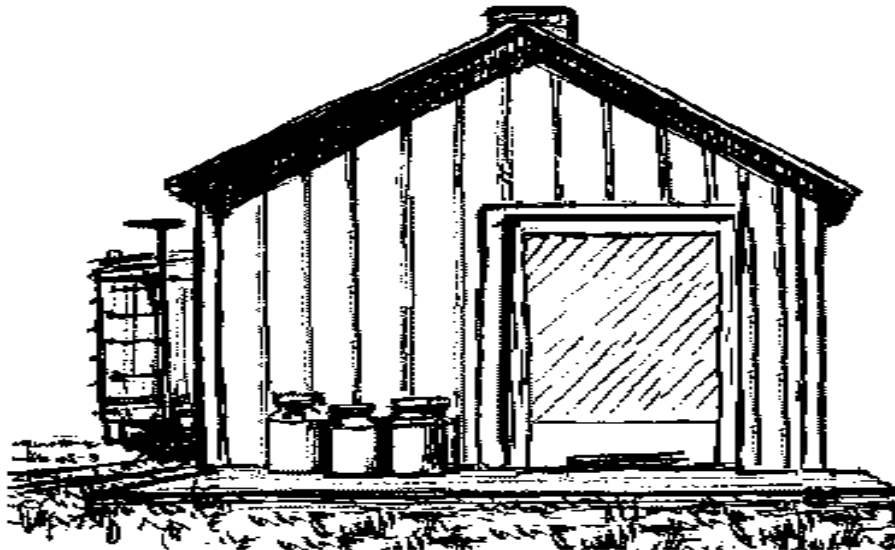
### Case Updates

*Gresart et al. vs. Buffalo and Pittsburgh Railroad, Inc. et al.*  
(see THE BULLETIN, June 2016)

Petition for Allowance of Appeal to Supreme Court of Pennsylvania *DENIED*  
2016 Pa. LEXIS 2389

*Union Pacific Railroad Company vs. William Nami*  
(see THE BULLETIN, December 2016)

Petition for Rehearing to the Supreme Court of Texas *DENIED*  
2016 Tex. LEXIS 852



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The people listed below have been designated to perform changes and updates to keep the General Claims Conference claims personnel directory website, ([AARGCC.org](http://AARGCC.org)) current. Therefore, if you have an update to make to your information or you are aware of any incorrect information appearing in the directory, please contact the appropriate person from the list below. The preferred method is to send them an email outlining the specific information to be added, deleted or revised.

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