STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEL FROM YORK COUNTY
Court of Common Pleas

Teasa K. Weaver, Master-In-Equity

Appellate Case No.: 2019-000984

Michael Collins, Appellant,

v.

Norfolk Southern Corporation, Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

Whether the Court erred in finding that Plaintiff failed to show Defendant failed to exercise reasonable care for Plaintiff's safety and that Defendant could not reasonably foresee an injury to Plaintiff's back and shoulder could occur during his railcar inspection.

Whether the Court erred in determining that Plaintiff's own negligence was the "sole cause" of the injuries.

Whether the Court's ruling was based, at least in part, on the doctrine of assumption of the risk which has been completely stricken from defenses available under the Federal Employer's Liability Act.

STATEMENT OF THE CASE

On September 1, 2017 Michael Collins brought this claim against his employer Norfolk Southern Railway alleging damages under the Federal Employer's Liability Act as a result of two separate incidents. The first incident occurred on or about March 31, 2016 when he was inspecting and repairing a railcar. (Collins Compl. ¶ 10, 11). While Collins was attempting to close the overhead door, the door locked up, causing the door to stop mid pull. (Collins Compl. ¶ 12). Collins contends that Norfolk Southern failed to provide him with a safe place to work due to Norfolk's failure to inform him of the defective car door.

The second incident occurred on or about August 13, 2016 when Collins was injured while attempting to open a door to an air compressor room. (Collins Compl. ¶ 22). Collins contends that Norfolk failed to provide him with information necessary to be able to open the door in order to do his required job.

Norfolk Southern Railway filed a motion for summary judgment on August 6, 2018 alleging Collins had failed to produce evidence that Norfolk Southern breached a duty of care with

respect to the injury sustained on March 31, 2016 and that Collins failed to produce any evidence that Norfolk Southern breached a duty of care with respect to the injury that occurred on August 13, 2016; there was no evidence that any alleged breach of duty by Norfolk Southern acted as the proximate cause of Collins's alleged injuries and damages; and Collins did not produce any admissible evidence showing a causal connection between any alleged negligence and his alleged injuries and damages. (Norfolk Southern Motion for Summary Judgment ¶ 2, 3, 5, 6).

Oral argument was held on November 15, 2018. (Transcript November 15, 2018). The Court below issued an Order Granting Norfolk Southern's Motion for Summary Judgment on March 25, 2019. (Order Granting Summary Judgment). Collins filed a Rule 59(e), SCRCP, motion for reconsideration on April 4, 2019. (Motion for Reconsideration). Oral argument was held on Collins's Motion for Reconsideration on May 8, 2019. (Transcript May 8, 2019). The Court below issued an order denying Collins's Motion for Reconsideration on May 16, 2019. (Order Denying Motion for Reconsideration). Collins filed his Notice of Appeal on June 13, 2019.

STANDARD OF REVIEW

A FELA action brought in state court is controlled by federal substantive law and state procedural law. *Norton v. Norfolk S. Ry.*, 350 S.C. 473, 476, 567 S.E.2d 851, 853 (2002). It is firmly established that questions of the sufficiency of the evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules. *Bean v. Cent. R. Co., Inc.*, 392 S.C. 532, 545, 709 S.E.2d 99 (S.C. Ct. App. 2011) (citing *Brady v. S. Ry.*, 320 U.S. 476, 479, 64 S.Ct. 232, 88 L.Ed. 239 (1943)). A summary judgment motion involves analysis of the sufficiency of the evidence, and therefore federal law applies. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 91 L.Ed. 202 (1986) (explaining that when determining whether summary judgment is appropriate, the judge's function is not to weigh the evidence and

determine the truth of the matter, but to ascertain whether "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party"); *see also Peterson v. Nat'l R.R. Passenger Corp.*, 356 S.C. 391, 396-97, 618 S.Ed. 903, 905-06 (2005) (applying federal procedural law to an appeal of a summary judgment motion in a state FELA action).

An appellate court reviews the granting of summary judgment, under the same standard applied by the trial court pursuant to Rule 56(c), SCRP: summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Wells v. City of Lynchburg*, 331 S.C. 296 (S.C. Ct. App. 1998) (citing *Baughman v. American Tel. Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Wells v. City of Lynchburg*, 331 S.C. 296, 302 (S.C. Ct. App. 1998) (citing *Koester v. Carolina Rental Ctr., Inc.*,313 S.C. 490, 443 S.E.2d 392 (1994); *Eagle Constr. Co. v. Richland Constr. Co.*,264 S.C. 71, 212 S.E.2d 580 (1975)).

II. Standards for Summary Judgment in FELA Cases

1. FELA is an Avowed Departure from Common Law

The Supreme Court has made clear that the FELA represents, "an avowed departure from the rules of common law." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329 (1958). The FELA is a "humanitarian" statute. *Metro-North Commuter Rail co. v Buckley*, 521 U.S. 424, 438 (1997). Recognizing the "special need" to protect railroaders from the inherently dangerous nature of their work, *Sinkler*, 356 U.S. at 329, Congress enacted the FELA to "shift part of the human overhead of doing business" from the employees to the employers. *Consolidated Rail Corporation v. Gotshall*, 512 U.S. 532, 542 (1994). Elsewhere, the Supreme Court has written that, "We have recognized generally that the FELA is a broad remedial statute and have adopted 'a standard of

liberal construction in order to accomplish [Congress'] objects.'" *Atchinson, Topeka &Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987).

The Act strips employers of their common law defenses of assumption of risk and contributory negligence as a bar to recovery, *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957), and abandons general concepts of proximate cause. *Green v. River Term. Ry.*, 585 F. Supp. 1019, 1024 (N.D.Ohio 1984), *aff'd* 763 F.2d 805 (6th Cir. 1985). The Third Circuit has stated, "The FELA represented a *radical change from the common law* in an attempt to assure workers a more sure recovery by abolishing many traditional defenses." *Poleto v Conrail*, 827 F.2d 1270, 1278 (3d Cir. 1987) (emphasis added).

"Despite its great utility in many kinds of litigation, the motion for summary judgment is not well adapted to cases under FELA." *Bean v. Cent. R. Co., Inc.*, 392 S.C. 532, 547, 709 S.E.2d 99 (S.C. Ct. App. 2011) (quoting 11 Am.Jur. *Trials* § 397 (1966). Particularly with regard to negligence claims brought by an employee against a railroad, there is a federal policy in favor of jury trials when there is evidence to support negligence in a FELA action. *Id* (citing *Miller v. Norfolk Southern W. Ry.*, 643 F.2d 1005, 1010 (4th Cir. 1981); 11 Am.Jur. *Trials* § 397 (1966) ("Summary judgment is almost always unavailable on the issue of negligence.").

2. <u>The Paramount Importance of Jury Determinations</u>

Consistent with the humanitarian purpose of the FELA, the standard for submitting a FELA case to the jury is significantly less stringent than in the ordinary negligence action. *Rogers*, 352 U.S. at 506; *Mendoza v. Southern Pacific Trans. Co.*, 733 F.2d 631, 633 (9thCir. 1984). Under the FELA, "the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence *played any part, no matter how slight*, in producing the injury or death for which damages are sought." *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630

(2011)(emphasis added). *See also Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). As a result, as the Third Circuit Court of Appeals has held:

> [A] trial court is justified in withdrawing such issues from the jury's consideration only in those ***extremely rare instances*** where there is a ***zero probability*** either of employer negligence or that any such negligence contributed to the injury of an employee.

Pehowic v. Erie Lackawana. Railroad Co., 430 F.2d 697, 699-700 (3rd Cir. 1970) (emphasis added). *See also, Mendoza v. Southern Pacific Transp. Co.*, 733 F. 2d 631 (9th Cir. 1984); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3rd Cir. 1991); *Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3rd. Cir. 1987) (*citing Pehowic's* "zero probability" test); *Gans v. Mundy*, 762 F.2d 338, 343-44 (3rd Cir. 1985) (*citing Pehowic*).

The burden of proof necessary to present a case to a jury is "significantly lighter under FELA than . . . in an ordinary negligence case." *Smith v. Soo. Line R.R. Co.*, 617 N.W.2d 437, 439 (Minn. Ct. App. 2000) (citing *Habrin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990)). The quantum of proof required to present a jury issue is described as a "scintilla" of evidence. *Id.* (citing *Hauser v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 346 N.W.2d 650, 653 (Minn. 1985)); *see also Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957) ("the test of a [FELA] jury case 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")(emphasis added).

The Second Circuit Court of Appeals has stated that, "[u]nder the FELA, 'the case must not be dismissed at the summary judgment phase unless there **is absolutely no reasonable basis** for a jury to find for the plaintiff.'" *Gadsden v. Port Authority TransHudson Corp.*, 140 F.3d 207 (2d Cir. 1998), *quoting Syverson v. Consolidated Rail Corporation*, 19 F.3d 824, 828 (2d Cir. 1994). As put more colorfully by the Seventh Circuit Court of Appeals, numerous cases have

affirmed submission of FELA claims to juries based on evidence "scarcely more substantial than *pigeon bone broth.*" *Green v. CSX Trans. Co.*, 414 F.3d 758, 766 (7th Cir. 2005), *quoting Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 132 (7th Cir. 1990).

The corollary of these principles is that juries play a significantly greater role in FELA cases than at common law. *Eggert v. Norfolk & Western Railway Co.*, 538 F.2d 509 (2nd Cir. 1976), *citing, inter alia, Rogers, supra*; *Eaton v. Long Island R. Co.*, 398 F.2d 738, 741 (2d Cir. 1968) (under FELA, juries' right to pass upon issues of fault and causality "must be most liberally viewed."). This is because Congress *intended the FELA to be remedial legislation and under the Act*, and **"'trial by jury is part of the remedy.'"** *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, *reh. denied,* 369 U.S. 882 (1962), *quoted in Eggert*, 538F.2d at 511; *Boeing Co. v. Shipman*, 411 F.2d 365, 371 (5th Cir. 1969) (**"trial by jury is part of the remedy"**) (*quoting Atlantic & Gulf Stevedores, Inc., supra*); *Baily v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) (right to a **jury trial is "part and parcel of the remedy** afforded" under the FELA). To deprive FELA plaintiffs of the benefit of a jury trial in "close or doubtful cases" is to "take away a goodly portion of the relief ... Congress has afforded them." *Baily*, 319 U.S. at 345.

The Supreme Court's emphasis on the paramount importance of jury determinations in FELA cases emerges from a review of FELA cases reaching back to the 1940's.[1] In *Bailey v. Central Vermont Railroad,* 319 U.S. 350 (1943), the plaintiff's decedent was killed at work. At the close of all the evidence, the railroad moved for a directed verdict. The trial court denied the

[1] FELA and Jones Act cases are the only exceptions to the Supreme Court's general rule that it does not take cases turning solely on the evaluation of evidence. "The practice of not taking cases turning solely on the evaluation of evidence has been consistently adhered to... except in the special class of cases arising under the Federal Employers' Liability Act and its twin, the Jones Act." *Sentilles v. Inter-Carribean Shipping corp.*, 361 U.S. 107 (1959) (emphasis added) The Supreme Court has granted *certiorari* in many FELA and Jones Act cases – "the special class of cases" – to ensure that lower courts adhere to its special FELA jurisprudence.

railroad's motion and submitted the case to the jury, which returned a verdict for the plaintiff. The railroad appealed, and the Supreme Court of Vermont reversed, holding that the trial court should have granted the motion for a directed verdict. 319 U.S. at 351-352. The Supreme Court of the United States reviewed the job performed by plaintiff's decedent, "the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail . . ." and then stated ". . . all these were facts and circumstances for the jury to weigh and appraise in determining whether [the railroad] in furnishing [plaintiff's decedent] with that particular place in which to perform the task was negligent." *Bailey,* 319 U.S. at 354. The Supreme Court emphasized the importance of jury determinations in FELA cases:

> **It [the right to trial by jury] is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.** Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . **To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.**

Bailey, 319 U.S. at 354 (emphasis added).

The Supreme Court underscored the paramount importance of jury determinations in FELA cases in *Tennant v. Peoria and Pekin Union Railway Co.,* 321 U.S. 29 (1943). In *Tennant,* the plaintiff's decedent was killed working in a railroad yard. There was no direct evidence as to the decedent's precise location when he was killed. While there was evidence of railroad negligence, there was no direct proof that the railroad's negligence proximately caused the decedent's death. The case was submitted to a jury, which returned a verdict in favor of the plaintiff. The railroad appealed, and the appellate court reversed this judgment, finding that there was no substantial proof the railroad's negligence proximately caused the plaintiff's death. The Supreme Court wrote

that, "We granted *certiorari* [citation omitted] because of important problems as to **petitioner's right to a jury's determination of the issue of causation."** 321 U.S. at 29-30. As to the facts:

> Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. . . If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusion for those of the twelve jurors.

321 U.S. at 32-33 (emphasis added).

Three years later, in *Lavender v. Kurn,* 327 U.S. 645 (1946), the Supreme Court once again reversed a FELA case where a reviewing court had set aside a plaintiff's verdict. In *Lavender*, the plaintiff's decedent was killed at work. The railroad's evidence suggested that the plaintiff's decedent had been murdered or that the accident could not have happened as the plaintiff's decedent claimed. The jury returned a plaintiff's verdict, the railroad appealed, and the Supreme Court of Missouri reversed the judgment ". . . holding that there was no substantial evidence of negligence to support the submission of the case to the jury." *327* U.S. at 647.

Once again the Supreme Court reviewed the trial court record and admonished a lower court for permitting a railroad defendant to re-litigate the underlying factual dispute on appeal. The Supreme Court wrote:

> But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances **it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. . . .** Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But **where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.** And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

327 U.S. at 652, 653 (emphasis added).

In 1963 the Court once more granted *certiorari* in a FELA case to reverse an appellate court that had improperly usurped the jury's fact-finding function. In *Gallick v. Baltimore and Ohio Railroad Co.,* 372 U.S. 108 (1963), a bug bit a railroad worker who was working near a stagnant pool of water on a railroad's right of way. The wound became infected and eventually the worker's legs were amputated. The railroad worker's doctors characterized the plaintiff's condition as "secondary to insect bite." The railroad moved for a directed verdict, which the trial judge denied. The jury found for the railroad worker.

On appeal, the Ohio Court of Appeals deemed the evidence nothing but "a series of guesses and speculations . . . a chain of causation too tenuous to support a conclusion of liability" and reversed the trial court's judgment. 372 U.S. at 112-113. The Supreme Court began its review by pointedly disagreeing with the state appellate court:

> We think that **the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers' Liability Act Case. . .** We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent.

372 U.S. at 113 (emphasis added).

The Supreme Court used *Gallick* to again admonish trial and appellate courts tempted to disregard jury determinations in FELA cases. The Court began its review by examining *Tennant v. Peoria, supra,* which the Court labeled as, "one of the leading cases" regarding a railroad worker's right to a jury determination on the issue of causation. 372 U.S. at 114. The Supreme Court then re-affirmed *Tennant's* central holding:

> **It is the jury, not the court, which is the fact-finding body.** It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be

> ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

372 U.S. at 115, *citing Tennant,* 321 U.S. at 35. After reviewing other similar holdings, the Supreme Court found the court of appeals to have, "erred in depriving petitioner of the judgment entered upon the special verdict of the jury." 372 U.S. at 122.

From *Tennant* to *Bailey* to *Lavender* to *Gallick*, the Supreme Court has steadfastly proclaimed the paramount importance of jury determinations in FELA cases. The jury – not the trial judge, and not an appellate court – is to be the fact-finding body. The Supreme Court's unique jurisprudence in FELA cases must be followed.

ARGUMENT

A. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO COUNT I WHEN IT FOUND NO EVIDENCE THAT DEFENDANT FAILED TO EXERCISE REASONABLE CARE FOR PLAINTIFF'S SAFETY OR THAT THE WORK METHOD USED IN THIS CASE WAS UNSAFE AND THAT THERE WAS NO EVIDENCE NORFOLK SOUTHERN COULD REASONABLY FORESEE THIS INJURY WOULD OCCUR.

On or about March 31, 2016, Appellant was working for Defendant in York County as a carman. On that date, Appellant was instructed by Appellee to inspect and repair a railcar. The railcar had already been tagged as defective, but Appellant had been given no information regarding the particular defect with this particular railcar. (Order Granting Summary Judgment pp. 3-4). Appellant's visual inspection of the railcar did not show any defects and that the only way he could determine if it was the door that had been noted as defective, was for him to pull on it. (Id. at p. 4). Appellant grabbed the door handle with both hands, pulled once, and the handle did not move, causing Plaintiff to injure his shoulder, neck and back. (Id. at p. 4). The court below found that the Plaintiff had experienced car doors that had acted similarly in the past, as well as

doors that had operated as they were intended to operate and that there was no way for Appellant to know prior to pulling on the door. (Id. at pp. 4). The court noted that on occasion, Appellant was made aware of the specific problems with each railcar prior to beginning his inspection, but that practice had not been made a standard practice by Appellee. (Id.).

Collins stated in his deposition that carmen routinely tried to get the yard crews to tell them what was wrong with a car when it was bad ordered, but there were times when there was nothing on the cars to identify any problems. (*Collins Depo.* at 196:17-197:5). This was one such instance that the yard crew failed to identify the problem, and no one filled out the bad-order tag to inform him that there was a problem with the box car door. *Id.* at 197:6-198:12. The court below failed to take into account Collins's testimony that he and other members of his craft had repeatedly tried to get the yard crews to be more consistent in their bad-order tagging of cars and tell the repairmen what was wrong with the car so "we'd have a heads-up before we started looking at it" so that they were not blindly walking into a dangerous situation. He also testified that despite the repairmen's requests for additional information when cars were bad-ordered, they routinely came into the yard with nothing written on them and the repairmen would have to use trial and error to determine what the problem may be. (*Id.* at 196:17-197:8).

The standards of liability for negligence under the FELA are significantly broader than in ordinary common-law negligence actions. The Supreme Court has stated that:

> Under this statute the test of a jury case 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. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence... The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506-508 (1957).

Because the FELA makes an employer liable if an injury results only in part from his negligence, the employee has a less demanding burden of proving causal relationship than would be required under the common-law doctrine of proximate cause. *Nivens v. St. Louis S.W. Ry. Co.*, 425 F.2d 114, 118 (5th Cir. 1970) (citing *Hausrath v. New York Cent. R.R.*, 401 F.2d 634 (6th Cir. 1968); *Lindauer v. New York Cent. R.R.*, 408 F.2d 638 (2nd Cir. 1969).

Moreover, summary judgment is inappropriate because questions of foreseeability must be resolved by a jury, which should be asked whether the railroad failed to observe "that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances. *BNSF Ry. Co. v. Nichols*, 379 S.W.3d 378, 389 (Tex. App.--Fort Worth 2012) (citing *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011)). If the evidence about foreseeability as it relates to the railroad's duty is disputed, as it is here, then "the jury must determine whether the railroad knew or should have known about a dangerous condition that could result in the employee's injury". *Union P. R. Co. v. Williams*, 85 S.W.3d 162, 168 (Tex. 2002), reaffirming *Mitchell v. Missouri-Kansas-Texas R. Co.*, 786 S.W.2d 659, 661 (Tex. 1990).

The test of foreseeability is whether the railroad was aware, or should have been aware, of the conditions which created a likelihood that its employee would suffer the type of injury he did. *BNSF Ry. Co. v. Nichols*, 379 S.W.3d 378, 389–90 (Tex. App.--Fort Worth 2012) (citing *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 503 (1957); *Union P. R. Co. v. Williams,* 85 S.W.3d 162, 166 (Tex. 2002)). In this case, there is evidence that Norfolk Southern was aware of a defect in its railcar and that it failed to inform Appellant of that defect, leaving him blind to find an already recognized defect.

As stated by the Seventh Circuit in *Harbin*, FELA cases should be submitted to the jury

based on evidence "scarcely more substantial than *pigeon bone broth.*" *Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 132 (7th Cir. 1990). The railroad's failure to implement and enforce a policy and procedures to inform its employees of defective railcars is at least substantial enough evidence for reasonable jurors to differ on whether that act was negligent and whether that negligence caused, in whole or in part, the employee's injuries.

B. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO COUNT II WHEN IT FOUND THAT APPELLANT'S OWN NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

On or about August 13, 2016, Appellant was working for Appellee as a carman in Mecklenburg County, North Carolina. On that date, Appellant was required to by Appellee to inspect and air test outbound cars. In order to accomplish this task, Appellant was required to use compressed air to ensure that the air brakes on the cars were operating correctly under the Federal Railroad Administration's required air tests. However, the compressed air was not operating correctly, so Appellant was required to go to the compressor room to trouble shoot the air. When Appellant got to the compressor room, there was a keypad lock. (*Collins Depo.* at 91:14-92:13). There are other keypad locks in the yard, including to get into the gate, the carman's room, the office, and the general foreman's room. (*Id* at 92:14-19). These keypads all have the same code. (*Id).* Plaintiff had never been instructed otherwise, so he believed that the keypad at the compressor room would have the same code. *Id.* Therefore, Plaintiff put in the code and tried to pull open the door. When that did not seem to work, he looked into the door jam and did not see a deadbolt, but at the top of the door frame it appeared that the door may have been stuck. *Id* at 93:1-12. He therefore pulled on the door with a little force, at which time it flew open, causing him to jerk back and injure his neck. *Id.* at 93:13-21. Even though carmen are required to use air in the performance of their duties, he had never been told or instructed that this door lock would be any different than

any other door on property. *Id.* at 93:23-94:4.

The court below found that Plaintiff's negligence was the sole cause of his injuries because it was neither a breach of duty nor foreseeable that Appellant would pull the door with enough force to break the lock when the code he had been given did not work. (Order Granting Summary Judgment p. 7). The court did not address any of the facts that it cited when making this determination. As stated above, the standard under FELA to present a case to the jury is significantly lower than at common law. A reasonable juror could determine that Appellant was not provided with the correct information to complete his job duties. The remedial nature of the FELA requires that cases with even slight evidence of employer negligence be submitted to the jury as the jury determination is part and parcel to a plaintiff's rights under FELA.

C. THE COURT BELOW ERRED WHEN IT ALLOWED THE DOCTRINE OF ASSUMPTION OF THE RISK TO ENTER INTO ITS ORDER AND OPINOIN.

The defense of assumption of the risk is strictly prohibited in FELA lawsuits. 45 U.S.C. §54; *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994); *Norfolk & Western R. Co. v. Ayers,* 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261 (2003). The law is clear that assumption of the risk cannot be masqueraded under some other name in FELA cases. Contributory negligence is a "careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." *Taylor v. Burlington N R.R. Co.*,787 F.2d 1309, 1316 (9th Cir. 1986). By contrast, "an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties constitutes an assumption of risk." *Id.* Thus:

> [W]hen an employee carries out his supervisor's general order in an unsafe manner, he is responsible under FELA for his own contributory negligence. But when an employee carries out a direct order, even if he has reason to know the order exposes him to danger, he is not contributorily negligent; rather his conduct falls under the abolished doctrine of assumption of risk. *Jenkins v. Union Pac. R.R. Co.*,22 F.3d

206, 211 (9th Cir. 1994).

Benson v. CSX Transportation, Inc., 274 Fed. Appx. 273, 276 (4th Cir. 2008).

This concept is most eloquently stated by in a dissent by Justice Musmanno in *Finnegan v. Monongahela Con. RR Co.*, 379 PA 63 (PA. 1954) when he stated:

> The Majority has completely ignored the 1939 amendment to the FELA (53 Stat. 1404, 45 U.S.C.A. 51) which completely obliterates, like a wave washing over imprints in the sand, the archaic concept of assumption of risk. An employee takes what his employer gives him. It is not for him to decide the equipment of the factory in which he works. He does not lay down the tracks over which, as conductor or brakeman, he is to shepherd the train to which he is assigned. Congress had attempted to wipe away the assumption of risk theory when it first passed the FELA, but courts throughout the nation, almost nostalgically or with incredulity that such a landmark in the law should really have disappeared, continued to charge injured employees with responsibility for the dangerous environment in which they were compelled to work. To reaffirm what they thought they had made clear in the original Act, the Federal lawmakers then in 1939 added the amendment which was intended to relegate the *assumption of risk* doctrine to a relic in the museum of the law. In transparent language Congress declared that an "employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The Supreme Court of the United States, then, affirming and approving the Congressional action, declared that the assumption of risk being dead and buried was not to be disinterred and re-introduced under some other designation. In language as clear as the morning sunrise, the Supreme Court of the United States said: "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to `non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, `Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here." (*Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58).
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> But the Majority here, apparently treating these words like vanishing shadows on the monument of time, is doing here the very thing which the Supreme Court of the United States has forbidden. The Majority has clothed the ghost of assumption of risk in the nondescript garment of "non-negligence" and by doing so has deprived Thomas Finnegan of the financial crutch with which a jury of his peers had supplied him because of the crippling injuries he sustained on April 30, 1949.

> . . . The FELA is a laudable piece of legislation in that it seeks to protect life and limb of workmen engaged in a most hazardous occupation. Although a housewife, when her husband railroader departs for work, no longer bids farewell to him as if he were a soldier going to war, she still knows that behind every telephone ring there lurks the fear of bad news. Accidents, wrecks, derailments and explosions still form part of the saga of railroads. Our lawmakers, because of their experience and knowledge and because of long, searching Congressional committee investigations, have taken cognizance of the dangers attendant upon railroading and thus, in the conscientious discharge of their legislative duties, they have provided protection for the workers and, in the event of death, for aid to their surviving dependents. The Federal Employers' Liability Act seeks under Federal jurisdiction to accomplish the humanitarian results flowing from States Workmen's Compensation Acts. While the FELA does not go so far as to provide for recovery in every case of death and injury, regardless of circumstance, it does say, as already indicated, that where negligence on the part of the railroad company in whole or in part is responsible for casualties, the railroad company shall make whole the resulting damage to the extent that a financial award can do so.
>
> *Finnegan*, 379 Pa. at 76-77, 89-90.

In *Buffo v. B. & O.R.R. Co.*, 364 Pa. 437 (Pa. 1950) the defendant argued that there was insufficient evidence to support a finding of negligence on the part of the defendant and that the plaintiff's injuries were the result of his own negligence in working amid rivets, bolts and scrap. The Pennsylvania Supreme Court wrote:

> Even if there was sufficient evidence to declare contributory negligence as a matter of law, plaintiff would not be barred completely from recovery. Defendant seeks to exculpate itself from its failure to provide a reasonably safe place to work by the argument that if plaintiff `. . . thought the presence of the rivet heads and small pieces of pipe was creating a hazard, then all [plaintiff] had to do before beginning work was to brush it out.' Defendant argues: `If [plaintiff] did not think it was hazardous, how can the defendant railroad company be held liable for failing to do so?' Such considerations are foreign to the law of negligence under the Federal Employers' Liability Act as declared by the Supreme Court of the United States. *Defendant's negligence cannot be determined by examining plaintiff's conduct.* To do so would be to apply contributory negligence as a defense under the guise of `non-negligence' of the defendant, which the Act prohibits. Cf. *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 58. It cannot be held that the failure of the *injured party* to perceive a negligent condition *establishes the absence of negligence* on the part of the defendant." (Italics in original decision).
>
> *Buffo*, 364 Pa. at 441-442.

In this case, the court below made specific findings that fall squarely within the doctrine of assumption of the risk. With respect to the first injury, the court found that Appellant was an experienced carman who should have been able to determine the problems with the railcar door because that was his job. (Order Granting Summary Judgment p. 6). In order to make that finding, the court clearly found that the Appellant assumed the risk of his employment. Since Congress amended 45 U.S.C. § 54 in 1939, it has been well settled that assumption of the risk has not been available as a defense in any case arising under the FELA. In *Tiller v. Atlantic Coastline R. Co.*, the United States Supreme Court held:

> Every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence."

318 U.S. 54, 58 (1943). Although the defense of assumption of risk has no place in a case arising under the FELA, courts must be vigilant in guarding against assumption of risk defenses masquerading as contributory negligence. *Thomas v. Union Ry. Co.*, 216 F.2d 18, 19-20 (6th Cir. 1954). Likewise, the Eighth Circuit has held that a defense of assumption of the risk is not proper in FELA cases. See *Birchem v. Burlington Northern R. Co.*, 218 F.2d 1047, 1049 (8th Cir. 1987) (plaintiff's use of defective equipment despite his knowledge of a railroad rule prohibiting use of unsafe equipment was not contributory negligence and evidence of the same was barred under the FELA as an assumption of the risk defense). Further, it is axiomatic that Defendant has a non-delegable duty under the FELA to furnish its employees with reasonably safe working conditions, which cannot be delegated. *Shenker v. Baltimore & Ohio R. R. Co.*, 374 U.S. 1, 7 (1963); *Payne v. Baltimore & Ohio R. R. Co.*, 309 F.2d 546 (6th Cir. 1962).

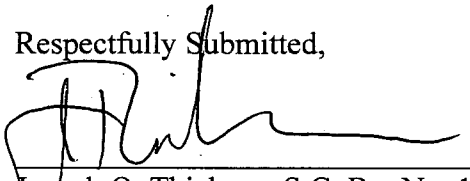
"Although there is some overlap between assumption of risk and contributory negligence, generally the two defenses are not interchangeable." *Taylor v. BNSF*, 787 F.2d 1309 (9th Cir.

1986); see also *Owens v. Union Pacific R. R.*, 319 U.S. 715, 724 (1943). At common law, an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties constitutes an assumption of risk. *Tiller*, 318 U.S. at 58. Contributory negligence, by contrast, is a careless act or omission on plaintiff's part tending to add new dangers to conditions that the employer created or permitted to exist. *Id.* Defenses that once embraced substantially within the concept of assumption of risk are barred under the FELA and may not be revived in the form of contributory negligence. *Id.* Where an act of alleged contributory negligence is but the practical counterpart of assumption of risk defense, it does not constitute a defense. *Id.*; *Birchem*, 812 F.2d at 1049. Here, Appellant was provided with a known defective railcar and was not warned of what that defect was. For it to be held that he was responsible for that event or that he should have known or been able to identify an unidentifiable defect is nothing but an attempt to interpose assumption of the risk into this FELA case.

CONCLUSION

Based on the foregoing, Appellants respectfully submit that this Court should reverse the circuit court's grant of Summary Judgment and remand for further proceedings.

Respectfully Submitted,



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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEL FROM YORK COUNTY
Court of Common Pleas

Teasa K. Weaver, Master-In-Equity

Case No.: 2017-CP-46-2574

Michael Collins, Appellant,

v.

Norfolk Southern Railroad Company, Respondent.

PROOF OF SERVICE

I certify that I have caused the service of Appellant's Initial Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid on November 18, 2019, addressed to the following:

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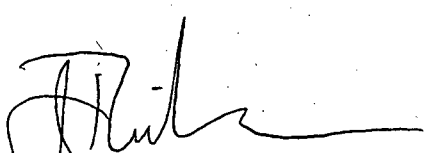

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November 18, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, SC 29201

RE: Michael Collins v. Norfolk Southern Corporation
Appellate Case No.: 2019-000984

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the following:

1. Appellants' Initial Brief;
2. Appellants' Designation of Matter to be Included in the Record on Appeal.

I would appreciate if you would file the originals and return the remaining clocked copy. By copy to this letter, counsel for Respondent is also hereby served with a copy of these documents.

Yours truly,

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