THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL 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 Corporation, Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Michael Collins (hereinafter "Collins") filed this action on September 1, 2017 alleging three causes of action under the Federal Employers Liability Act ("FELA") against his employer, Appellee Norfolk Southern Railway Company (incorrectly identified in the complaint as Norfolk Southern Corporation and hereinafter referred to as "Norfolk Southern"). In Count I, Collins alleged that Norfolk Southern was negligent in connection with an incident that occurred on March 31, 2016, in which he alleged he was injured while inspecting a door on a railroad boxcar that it was within his duty and responsibility to inspect and repair as a railroad carman. In Count II, Collins claimed negligence by Norfolk Southern when he allegedly hurt himself on August 13, 2016 while forcefully opening a locked door on an air compressor room after repeatedly entering the incorrect code on the security door lock. Finally, Count III sought damages for alleged cumulative trauma injuries occurring throughout Collins' years of work with Norfolk Southern. *See Compl.*, pp. 1-11.

Norfolk Southern filed its answer to Collins' complaint on October 12, 2017, denying his allegations of negligence and asserting multiple affirmative defenses. Answer, pp. 1-10. During his deposition, Collins admitted that no negligence by Norfolk Southern had occurred with respect to Count I and made other admissions establishing that the injuries he claimed with respect to Count II were due solely to his negligence, thereby prompting Norfolk Southern to file a motion for summary judgment on August 6, 2018. *Mtn. for Summ. J.*, at 1-2. The motion also addressed Count III of the complaint and sought dismissal of Collins' punitive damages claim. Prior to the hearing, Collins filed a memorandum in which he conceded to dismissal of his claims in Count III as well as his claim for punitive damages. *See Collins' Mem. in Opp. to Mtn. for Summ. J.*, at 1. Thus, the only contested issues at the hearing related to Counts I and II.

On November 15, 2018, the circuit court, with the Honorable Teasa Weaver presiding, heard arguments on Norfolk Southern's motion for summary judgment. Following the hearing, on March 25, 2019, Judge Weaver entered an order granting Norfolk Southern's motion in its entirety. *Order Granting Summary J.*, pp. 1-8. Collins filed a motion to alter or amend the judgment on April 4, 2019, which Judge Weaver heard on May 8, 2019. *Collins' Mtn. to Alter/Amend*, pp. 1-5. Thereafter, Judge Weaver entered an order dated May 16, 2019 denying Collins' motion to reconsider and affirming her prior ruling granting Norfolk Southern's motion for summary judgment. *Order Denying Mtn. to Alter/Amend*, pp. 1-3.

Collins timely filed this appeal on June 13, 2019.

STATEMENT OF FACTS

Collins worked as a carman for Norfolk Southern from 1981 through 2016. He spent the vast majority of his career at Norfolk Southern's Rock Hill yard. One month before the August 13, 2016 incident at issue in Count II, Norfolk Southern transferred Collins to a Norfolk Southern yard in Charlotte, North Carolina. *See Compl.* ¶ 30. Collins reported to his family physician and testified at his deposition that this transfer made him unhappy and caused him a great deal of stress. *Collins Dep.* 120:25-122:14 and Exhibit 7. Collins also told his doctor that he had been given the option to retire or drive to Charlotte for third shift work, and he was not inclined to work in Charlotte. *Id.* at 121:12-24 and Exhibit 7.

As a carman, Collins' duties included "inspection of locomotives, inspections of cars, and repairing of cars." *See Collins Dep.* 10:19-11:3. Collins would inspect boxcars for any defects or issues, and it was his responsibility to find the defects, fix them and make sure the cars were safe to operate. *Id.* at 11:12-12:3.

Collins' appeal concerns two separate incidents in which he claims he was injured while he was employed with Norfolk Southern.[1] Collins first alleges that he injured his neck, back, and shoulder on March 31, 2016 when he was attempting to open a boxcar door, and the door "locked up" causing it to stop mid pull. *See Compl.* ¶¶ 9-18. Medical records actually indicate that these medical issues pre-dated this incident by several months, and that Collins had sought and received medical care for reported issues with his neck and back as early as November and December, 2015. *See Collins Dep.* 73:14-83:2 and Exhibits 1-3.

In any event, the car at issue was what Collins described as a "reject car" which had been sent by employees of the Bowater plant to Norfolk Southern for inspection and repair. *Collins Dep.* 31:12-32:8. Collins knew there was something wrong with the car when he went to check it, and he admitted that it was his job to inspect for and find any defects in the car, including the door, and repair them. *See Collins Dep.* 32:19-33:5; 39:16-40:5.

Collins was working on the night in question with another carman, Jerry Davis. *Id.* at 28:7-11. However, Collins was the only one who worked on the allegedly defective door. Collins testified that while pulling on the door to open it, he felt pain through his back and shoulders. *Id.* at 42:19-43:6. Neither Collins nor Davis reported the incident to a supervisor or anyone else at Norfolk Southern. *Id.* at 44:16-47:2. They did not let anyone know of any issues with the railcar. Despite Norfolk Southern rules requiring that injuries occurring on the job be reported, Collins did not report the incident. *Id.* at 57:1-8. Likewise, he didn't request any medical attention. *Id.* at 58:1-3. Collins never reported the incident had occurred at all until he filed his lawsuit against Norfolk Southern nearly 18 months later. *Id.* at 65:4-8.

[1] As noted above, Collins did not contest the grant of summary judgment on Count III of his Complaint or on his request for punitive damages, so Count III and punitive damages are not at issue in this appeal.

Because Collins never reported the incident and never identified the car in question, Norfolk Southern was not able to inspect the car. Regardless, there was no question that Norfolk Southern did nothing wrong to cause the incident and Collins' alleged injuries. When asked specifically what Norfolk Southern did wrong to cause any alleged injuries related to this incident, Collins candidly admitted: "I don't think Norfolk Southern did anything wrong because Norfolk Southern didn't work on the cars, I did." *Id.* at 84:7-11.

The second incident alleged by Collins occurred on August 13, 2016 in the Charlotte Yard when Collins forced open and broke a keypad-protected door to the air compressor room. *See Compl.* ¶¶ 19-28. Collins testified that as he was inspecting outbound cars that day, he did not have any compressed air, which is needed to inspect the cars. *See Collins Dep.* 91:9-94:4. He went to the air compressor room, and the door to the room was locked with a key pad lock. *Id.* Collins did not know the code to unlock the door and entered an incorrect code into the key pad twice. Not surprisingly, the door did not open. *Id.* at 104:7-14. Collins testified that he understood when he went to the compressor room on August 13, 2016 that the reason there was a keypad lock on the door was so that the door would remain locked unless someone entered the proper code. *Id.* at 105:16-23. However, after the code failed twice, and even though he had both a radio and a cellphone that would have allowed him to call someone to get the correct code, Collins did not call his co-worker who was working with him, his supervisor, or any other individual in the Charlotte yard to tell them that he could not get the door open or ask what the correct code was. *Id.* at 100:3-103:22. Instead, he forcefully attempted to open the locked door. Collins testified:

> Q. So you made the decision not to call anybody by radio, not to use your cell phone, but to continue trying to get the door open, is that fair to say?

A. Correct, yes.

Id. at 103:23-104:2. Instead, he assumed the door was stuck and made the decision to "just pull it open." *Id.* at 104:14. In fact, he admitted:

> Q. So if I understand what you're telling me, Mr. Collins, then you tried it twice. It didn't open. The third time you didn't even try the code. You just forcefully pulled it open?
>
> A. Yes, sir, correct.

Id. at 104:15-19. Collins pulled so hard and with such force that the lock broke off and fell to the floor inside the compressor room. *Id.* at 105:7-15.

Like the prior incident with the car door, Collins did not report the incident to management when it occurred and did not seek any medical care. *Id.* at 108:25-109:19. In fact, it was not until a couple of weeks later, on August 31, 2016 while meeting with management to inform them that he would be out of work due to osteoarthritis in his hip, that Collins for the first time reported the alleged incident of August 13. *Id.* at 114:7-115:23; 117:4-14. Collins had been working regularly and did not miss any time from work related to the August 13 incident. *Id.* at 118:7-16.

STANDARD OF REVIEW

While generally state procedural law and federal substantive law apply to FELA actions brought in state court, summary judgment motions involve an analysis of the sufficiency of the evidence, and courts apply federal procedural law. *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 545, 709 S.E.2d 99, 106 (Ct. App. 2011). Rule 56(a) of the Federal Rules of Civil Procedure provides, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "The substantive law identifies which facts are material, and "[o]nly

disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Bean*, 392 S.C. at 545, 709 S.E.2d at 106 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* Moreover, "[f]actual disputes that are irrelevant or unnecessary will not be counted." 392 S.C. at 546, 709 S.E.2d at 106. In other words, "before the case may be properly left to the jury there must be more than a scintilla of evidence establishing defendant's liability." *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). "[U]nder the federal standard both the trial and appellate courts must ask whether a fair, impartial, and reasonable juror could return a verdict for the non-moving party." *Id.* The court "must ask whether more than a scintilla of evidence was presented which '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.'" *Id.* (quoting *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957)). Notwithstanding the strong federal policy in favor of jury trials, South Carolina appellate courts may affirm the grant of summary judgment to a railroad in an FELA action when there is insufficient evidence of negligence on the railroad's behalf. *Bean*, 392 S.C. at 547, 709 S.E.2d at 107.

ARGUMENTS

1. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO COUNT I, AS APPELLANT ADMITTED THAT NORFOLK SOUTHERN DID NOTHING WRONG TO CAUSE THE ACCIDENT AND THERE WAS NO EVIDENCE THAT ANY NEGLIGENCE BY NORFOLK SOUTHERN PROXIMATELY CAUSED THE INJURIES CLAIMED BY APPELLANT.

Courts have long held that "FELA is not a workers' compensation scheme and does not make the employer the insurer of the safety of his employees while they are on duty." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 49, 656 S.E.2d 20, 26 (2008). The basis of an employer's liability under the FELA "is his negligence, not the fact that injuries occur." *Id.* In other words, "[t]o prevail on a FELA claim, the plaintiff must prove 'the traditional common law elements of negligence (i.e., duty, breach, causation and damages) and that the employer's negligence 'contributed, in whole or in part, to the worker's injury.'" *Montgomery*, 376 S.C. at 47, 656 S.E.2d at 25 (quoting *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369 n.5, 635 S.E.2d 97, 101 n.5 (2006)).

A railroad's duty to exercise reasonable care under the FELA means "reasonable in light of the normal requirements of the job." *Conway v. Consolidated Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983); *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 94, 588 S.E.2d 87, 91 (2003) ("Norfolk Southern had a duty to provide its employees with a safe workplace. . . . Nevertheless, 'the employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.'"). Thus, a plaintiff does not state a claim under the FELA by alleging that he was injured while performing tasks that were merely "part of the work" or a normal physical demand of his job. *Parson v. CSX Transp.,*

Inc., 714 F. Supp. 2d 839, 843 (N.D. Ohio 2010); *Tootle v. CSX Transp., Inc.*, 746 F. Supp. 2d 1333, 1338 (S.D. Ga. 2010).

This case is controlled by the South Carolina Supreme Court's ruling in *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003). Collins never cited or distinguished this controlling authority in the trial court and he continues to ignore the case on appeal. This is not surprising, as *Rogers* completely defeats Collins' claim and shows that the trial court properly granted Norfolk Southern's motion for summary judgment.

In *Rogers*, the plaintiff was an assistant track supervisor who was sent to inspect a hole beneath the tracks as part of his job duties and then claimed he was injured while he was inspecting the hole. *Id.* The South Carolina Supreme Court found that there was no negligence on the part of Norfolk Southern with respect to the plaintiff's injuries, as "Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site. Rogers' job was to inspect the area around the track and to inform Norfolk Southern of any danger." 356 S.C. at 94, 588 S.E.2d at 91.

Similar to the plaintiff in *Rogers*, Collins was employed by Norfolk Southern to inspect and repair railcars; he admittedly knew that the railcar he was inspecting had an issue which he was charged with inspecting for and repairing; and he claimed that he was injured while inspecting the very railcar he was assigned to repair. As *Rogers* plainly holds, this does not constitute negligence on the part of Norfolk Southern.

Rather than attempt to discuss or distinguish *Rogers*, Collins devotes nearly 50% of his brief to a philosophical discussion of the FELA that has no direct relevance to his case or the rulings made by the trial court in his case. *See Collins' Initial Brf.*, at 3-10. Collins appears to be suggesting with this recitation that summary judgment can never be granted in an FELA case and

that therefore the court erred in granting the motion here. Collins is wrong. South Carolina courts have held that summary judgment is proper and should be granted in FELA cases. *See e.g., Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 401,02, 618 S.E.2d 903, 908 (2005) (affirming summary judgment in FELA case); *Bean v. S.C. Central R.R. Co.*, 392 S.C. 532, 709 S.E.2d 99 (Ct. App. 2011) (same).

These South Carolina cases are consistent with numerous federal cases which likewise have upheld summary judgment in FELA cases. *See Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) ("As a consequence of this lack of evidence, any suggestion that CSX was negligent rests on mere speculation and conjecture, and the district court therefore properly granted summary judgment against Deans on his FELA claim."); *Sowards v. Chesapeake & O.R. Co.*, 580 F.2d 713, 714 (4th Cir. 1978) ("In the case before us, giving plaintiff the benefit of every doubt, we can find no factual basis upon which a jury could reasonably find his employer negligent under FELA."); *Lafevers v. Norfolk Southern Ry.*, C.A. No. 6:13-1460-TMC, 2014 U.S. Dist. LEXIS 84778, at *8 (D.S.C. June 23, 2014) (granting summary judgment in FELA case); *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 271 (6th Cir. 2007) ("The record in this case does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door. In the absence of that evidence, summary judgment for Grand Trunk was appropriate."); *Cash v. Norfolk S. Ry. Co.*, C.A. No. 6:13-CV-00056, 2015 U.S. Dist. LEXIS 4293, at *18 (W.D. Va. Jan. 14, 2015) ("Here, Plaintiff does not point to any negligent act or omission of NSR to support a FELA claim, and the record discloses no such act or omission."). As already noted, FELA claims apply federal substantive law. Thus, as these cases make plain,

summary judgment is far from a novel or rejected concept in FELA cases in either state or federal courts as Collins suggests.

Collins' procedural arguments therefore afford him no relief, nor do his arguments on the merits regarding the evidentiary record. Collins asserts that "[t]he court below failed to take into account Collins' 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." *See Collins Initial Brf.*, at 11. This contention, however, is incorrect. The trial court specifically stated in its Order, "Plaintiff stated at times he was made aware of the issue prior to repairing a car (by the yard crews or others), but provided nothing further." *See Order Granting Mtn. for Summ. J.*, at 6. Thus, the trial court did not "fail to take into account" Collins' testimony that at times he was given information about what was wrong with a railcar and other times he was not, but instead specifically mentioned it in the order.

Also, after acknowledging this testimony, the Court identified undisputed testimony from Collins in the record that defeats his claim. This included Collins' admission that the work area did not contribute to his difficulty in opening the door. *Id.* at 4. Even more damaging, the trial court properly found Collins' admission of no negligence controlling when he testified:

> Q. What do you think that Norfolk Southern did wrong that caused your injuries that day?
>
> A. I don't think Norfolk Southern did anything wrong because Norfolk Southern didn't work on the cars, I did.

Collins Dep. 84:7-11. Analyzing this testimony, the trial court noted that "when asked what Defendant did wrong, Plaintiff made no mention regarding lack of notice, and denied

wrongdoing by the Defendant." *See Order Granting Mtn. for Summ. J.*, at 6. Because Collins did not contend at deposition that lack of notice caused the incident, he cannot now argue this as a basis for his claim.

Last, as the court below correctly ruled, Collins cannot escape the fact that it was part of his regular job duties to inspect railcars, and there is no cognizable claim under the FELA for injuries that occur while performing tasks that are merely "part of the work" or a normal physical demand of the job. *Parson v. CSX Transp., Inc.*, 714 F. Supp. 2d 839, 843 (N.D. Ohio 2010); *see Tootle v. CSX Transp., Inc.*, 746 F. Supp. 2d 1333, 1338 (S.D. Ga. 2010) ("Plaintiff's testimony as to the physical demands of her position is 'only a description of her job and is not evidence that she [was] required to perform her job in an unsafe manner.'"); *Zarecki v. National R.R. Passenger Corp.*, 914 F. Supp. 1566, 1572 (N.D. Ill. 1996) (finding that a plaintiff's testimony was "only a description of her job and not evidence that she is required to perform her job in an unsafe manner"). Courts have long held that "[t]here is no duty owed by the railway company to inspect for defective equipment to an employee whose duty is to inspect such equipment, and in the absence of such duty, negligence cannot be predicated on such failure." *Wood v. Southern Pac. Co.*, 337 P.2d 779, 782 (Or. 1959) (citing *Barnett v. Terminal R. Asso.*, 228 F.2d 756, 761 (8th Cir. 1956)). As Collins admitted with respect to his carman duties:

> Q. And you understand before you ever go out and look at them that I'm [sic] looking at cars that have been rejected for some reason?
>
> A. Yes, sir.
>
> Q. And it's your job as the carman to look at the car and find out why it's been rejected, is that right?
>
> A. Yes, sir.

Q. And then to repair it and fix it, as you told me earlier, once you discover what the defect is?

A. Correct.

Collins Dep. 32:19-33:15. In fact, Collins explicitly acknowledged that it was his job as a carman to determine whether there was a problem with the door on the rail car at issue. *Id.* at 39:16-40:5.

Thus, Collins offered no evidence to support his Count I claim against Norfolk Southern for allegedly being injured by equipment he was tasked with inspecting and repairing. When under oath, Collins properly admitted that Norfolk Southern did nothing wrong. The court below likewise ruled correctly in taking Collins at his word, analyzing the record evidence, and finding no evidence of any negligence on the part of Norfolk Southern.

2. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO COUNT II, AS THE UNDISPUTED EVIDENCE IN THE RECORD SHOWS THAT APPELLANT WAS SOLELY RESPONSIBLE FOR HIS OWN INJURIES BY FORCING OPEN A LOCKED DOOR AND ANY INJURIES TO APPELLANT WERE NOT REASONABLY FORESEEABLE.

With respect to the August 13, 2016 incident that forms the basis for Count II of the Complaint, the trial court properly ruled that Collins' own negligence was the sole proximate cause of any injuries he allegedly sustained and such injuries were not the result of any wrongdoing by Norfolk Southern. "When an employee's own negligence is the sole proximate cause of his injuries, the employer cannot be found liable pursuant to FELA." *Hurley v. Patapsco & B. R. R. Co.*, 888 F.2d 327, 330 (4th Cir. 1989); *see Toth v. Grand Trunk R.R.*, 306 F.3d 335, 345 (6th Cir. 2002) ("If the employee's own negligence was the sole cause of the accident, then it is proper to conclude that employer negligence played no role in causing the injury."). In other words, "[a]n employer is not liable under FELA if the evidence establishes

that the sole cause of an employee's injuries is the employee's failure to exercise reasonable care for his own safety. . . . An employer is not liable where it has no reason to believe its employees will be careless about their own safety." *Lanham v. CSX Transp.*, No. 92-2310, 1993 U.S. App. LEXIS 13045, at *6-*7 (4th Cir. June 2, 1993); *see Chesapeake & O. R. Co. v. Burton*, 217 F.2d 471, 474 (4th Cir. 1954) (finding that a plaintiff failed to state a claim against a railroad where the employee's train stopped, but the employee stepped in front of a truck).

For instance, in *Lanham*, the plaintiff suffered serious injuries after a tire on his company-assigned truck blew while he was en route to repair a malfunctioning signal. The plaintiff alleged that CSXT was negligent in providing him a truck with defective tires. *Lanham*, 1993 U.S. App. LEXIS 13045, at *2. However, the plaintiff had been informed that the tires on the truck were worn and needed to be replaced, and it was his responsibility to maintain the vehicle. As such, the Fourth Circuit upheld the trial court's grant of summary judgment and held as follows:

> From the time he obtained the truck, Lanham knew that the tires needed to be replaced. For at least three days prior to the accident, Lanham knew where to purchase the new tires. Instead of replacing the tires or driving his own truck, Lanham chose to drive Beklehimer's truck. In our view, the accident was solely due to Lanham's failure to replace the tires and CSX is not liable for its failure to anticipate Lanham's careless disregard for his own safety.

Id. at *7-*8.

Similarly, in *Hurley*, the plaintiff was a machinist in a railroad's Locomotive Repair Shop and suffered severe injuries when he was pulled into a lathe after his loose-fitting sweater became caught in the lathe. *Hurley*, 888 F.2d at 328. The plaintiff alleged that the railroad was negligent in failing to provide adequate lighting in the repair shop. *Id.* However, the Fourth Circuit found that the plaintiff presented no evidence "as to why the lighting in the repair shop

made operation of the lathe dangerous or how direct lighting could have prevented this accident." *Id.* at 330. The court went on to find:

> Given the evidence presented, the district court properly concluded that plaintiff's negligence was the sole proximate cause of the accident. Appellant was injured because he wore a loose-fitting sweater and "leaned in" too close to the lathe. Absent speculation, no act or omission of appellee can be said to have played any role in causing appellant's injuries.

Id.

Collins' argument with respect to Count II that "[a] reasonable juror could determine that Appellant was not provided with the correct information to complete his job duties," is misplaced. *See Collins Initial Brf.*, at 14. The August 13, 2016 incident occurred when Collins tried to force open a locked door because he did not know the lock code and made no effort to obtain it despite multiple avenues available to him. Collins was not somehow denied information necessary for him to complete his job duties. He had the same access as all other employees to the compressor room – he just needed to exercise common sense and input the correct lock code (or ask someone for it) before he broke down the door and hurt himself.

As with Count I, Collins' testimony and admissions regarding the August 13, 2016 incident set forth in Count II provided more than an ample basis for the trial court's summary judgment ruling. Collins testified that he understood when he went to the compressor room that the reason there was a keypad lock on the door was so that door would remain locked unless someone entered the proper code. *Id.* at 105:16-23. However, after the code failed twice, and even though he had both a radio and a cellphone that would have allowed him to call someone to get the correct code, Collins did not call his co-worker who was working with him, his supervisor, or any other individual in the Charlotte yard to tell them that he could not get the door open or ask what the correct code was. *Id.* at 100:3-103:22. Collins testified:

Q. So you made the decision not to call anybody by radio, not to use your cell phone, but to continue trying to get the door open, is that fair to say?

A. Correct, yes.

Id. at 103:23-104:2. Instead, he made his own personal assumption that the door was stuck and decided to take matters into his own hand and "just pull it open." *Id.* at 104:14. In fact, he admitted:

Q. So if I understand what you're telling me, Mr. Collins, then you tried it twice. It didn't open. The third time you didn't even try the code. You just forcefully pulled it open?

A. Yes, sir, correct.

Id. at 104:15-19. Collins pulled so hard on the door that the lock broke off and fell to the floor inside the compressor room. *Id.* at 105:7-15.

Based on this testimony, the trial court properly found the following facts were undisputed: (1) the door was equipped with a keypad lock like many other doors at the facility; (2) Collins saw and observed the lock; (3) Collins tried to input a code and the door wouldn't open because he was using the wrong code; (4) Collins did not contact his co-worker who was at the job site with him or call his supervisor who he admitted he could contact at any time to get the correct code; and (5) on his third attempt, Collins tried no code at all and pulled the door so hard and so forcefully that he broke the lock. *See Order Granting Summ. J.*, at 5, 7. In light of these undisputed facts and applicable law, the court correctly ruled that Collins was solely responsible for his own alleged injuries and that "[i]t is neither a breach of duty nor foreseeable that Plaintiff, following two failed attempts to open a door after entering a key code and turning the handle, would on a third attempt, open the door with enough force that he broke the lock off the door. Any injury Plaintiff alleges he received from this incident is solely attributed to his

own negligence." *See Order Granting Summ. J.*, at 7; *see also Sheppard v. CSX Transp. Inc.*, 78 F. App'x 878, 883 (4th Cir. 2003) ("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").

Last, the trial court also properly held that Collins' claim in Count II failed due to lack of foreseeability. "Norfolk Southern's duty to provide a safe working environment extends only to foreseeable dangers." *Rogers*, 356 S.C. at 93, 588 S.E.2d at 90 (emphasis added). Furthermore, "[a]n employee has a duty to exercise reasonable and ordinary care for his own safety." *Monroe v. S. Ry.*, 436 S.E.2d 568, 570 (Ga. App. 1993); *see Williamson v. Southern R. Co.*, 183 S.C. 312, 319-20, 191 S.E. 79, 83 (1937) (stating that a railroad "had the right to act on the belief that the train crew and Mr. Williamson, all of whom knew of the engine's intended movements, would take reasonable precaution to keep out of danger").

It was not reasonably foreseeable to Norfolk Southern that Collins would defy logic and break the lock on a door in an effort to get inside rather than use readily available options to get the correct lock code or simply wait until someone with the code could assist. In fact, Norfolk Southern rules, with which Collins admitted he was familiar and had been trained on, specifically prohibit employees from making repeated efforts to use tools, equipment or appliances that cannot be operated with a normal level of exertion and provide that "repeated attempts must be avoided." *See Collins Dep.* 132-135 and Exhibit 10. Likewise, the only evidence before the trial court was that Collins failed to exercise reasonable and ordinary care for his own safety, and that conduct by him was the sole cause of the incident. As such, the court below properly granted summary judgment as to Count II, and that ruling should be affirmed.

3. THE COURT DID NOT RELY UPON THE DOCTRINE OF ASSUMPTION OF THE RISK AS A BASIS FOR ITS RULING, AS NORFOLK SOUTHERN DID NOT RAISE THIS AS A DEFENSE AND THERE IS NO MENTION OF ASSUMPTION OF THE RISK IN THE COURT'S ORDER

Collins is also incorrect in arguing that "the court below made specific findings that fall squarely within the doctrine of assumption of the risk." *See Collins Initial Brf.*, at 17. As an initial matter, Norfolk Southern never argued or contended that Collins' claims are barred by assumption of the risk. Norfolk Southern did not plead assumption of the risk as a defense and it was not a basis of Norfolk Southern's summary judgment motion. In fact, at the hearing on Norfolk Southern's motion for summary judgment, Norfolk Southern counsel specifically stated: "**There are defenses that might be available in the common law claims that are not available in the FELA claim, like assumption of the risk or like pure contributory negligence. I haven't argued those here today.**" Hrg. Tr. 22:16-20 (emphasis added). This was reiterated at the hearing on Collins' motion to reconsider. *See* Hrg. Tr. 16:12-17:22.

Moreover, nowhere in the trial court's order does the court mention the "assumption of the risk" doctrine and it was clear that both Norfolk Southern and the Court understood that assumption of the risk does not apply to FELA cases and no such ruling occurred here. At the hearing on Collins' motion to reconsider, the trial court made this clear, stating: "as far as the assumption of the risk, my order came from looking through the exhibits that were – that were put forth, determining whether or not negligence had been shown, so **I did not review it for any assumption of the risk**. . . ." Hrg. Tr. 20:17-24 (emphasis added)

Second, Collins' argument misunderstands the concept of assumption of the risk. Collins states in his brief that assumption of the risk is "an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties." *See Collins*

Initial Brf., at 14. This is directly contrary to what Collins argued to the trial court and what Collins contends actually occurred. Here, Collins does not contend that he was "knowledgeable of a dangerous condition" and accepted it anyway, but argues that he was unaware of the dangerous condition and was injured while trying to discover it. Accordingly, Collins' own argument shows that assumption of the risk was never an issue and formed no basis of the trial court's ruling. The trial court's Count I ruling was based on the fact Collins presented no evidence of negligence on the part of Norfolk Southern and even admitted it under oath.

Last, the statement in the trial court's order that Collins was charged as a carman with inspecting and repairing railcars is not a finding that Collins assumed the risk of the dangers of the job and therefore could not pursue any claim. Instead, it addresses the extent and limits of a railroad's duty under the FELA. The FELA is not a workers' compensation system. *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 49, 656 S.E.2d 20, 26 (2008). While a railroad employer unquestionably has "a duty to provide its employees with a safe workplace," it "is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated." *Rogers*, 356 S.C. at 94, 588 S.E.2d at 91. Again, under the FELA "[t]here is no duty owed by the railway company to inspect for defective equipment to an employee whose duty is to inspect such equipment, and in the absence of such duty, negligence cannot be predicated on such failure." *Wood*, 337 P.2d at 782. Thus, the comment by the court below that Collins' duties were to inspect and repair railcars is an accurate description of his job as a carman, which courts have found establishes no breach of duty on the part of a railroad and provides no basis for a claim that a railroad forced Collins to conduct his job in an unsafe manner. *See Zarecki*, 914 F. Supp. at 1572; *Rogers v.*

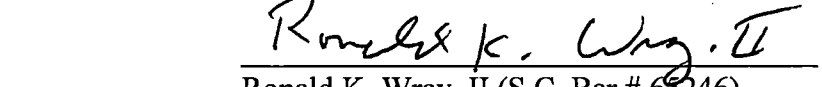
Norfolk S. Corp., 356 S.C. at 94, 588 S.E.2d at 91. Thus, the trial court merely acknowledged that Collins presented no evidence that there was any negligence on the part of Norfolk Southern or that the injuries alleged by him were outside of the "normal requirements" of his job. *See Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594, 598 (1st Cir. 1996) ("The employer's duty to maintain a safe workplace does not require all dangers to be eradicated, but it does demand the elimination of those that can reasonably be avoided in light of the normal requirements of the job."). As such, Collins' claims failed as a matter of law, not because he "assumed the risk" of the injuries he claimed, but because he failed to show any negligence by Norfolk Southern proximately caused his injuries.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court granting summary judgment in favor of Norfolk Southern.

December 18, 2019

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL 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 Corporation, Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, Norfolk Southern Corporation, certifies that I have this 18th day of December, 2019, served copies of Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal upon counsel for the Appellant by causing them to be deposited in the United States Mail, first-class postage prepaid, addressed to:

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December 18, 2019

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 Initial Brief of Respondent, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service of same.

I would appreciate if you would file the originals and return the remaining clocked copies in the self-addressed, stamped envelope. By copy of this letter, counsel for Appellant is also hereby served with a copy of these documents.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.

Ronald K. Wray, II

RKW/meb
Enclosures

cc: Joseph O. Thickens, Esq. (w/enclosures)
J. Eric Cavanaugh, Esq. (w/enclosures)
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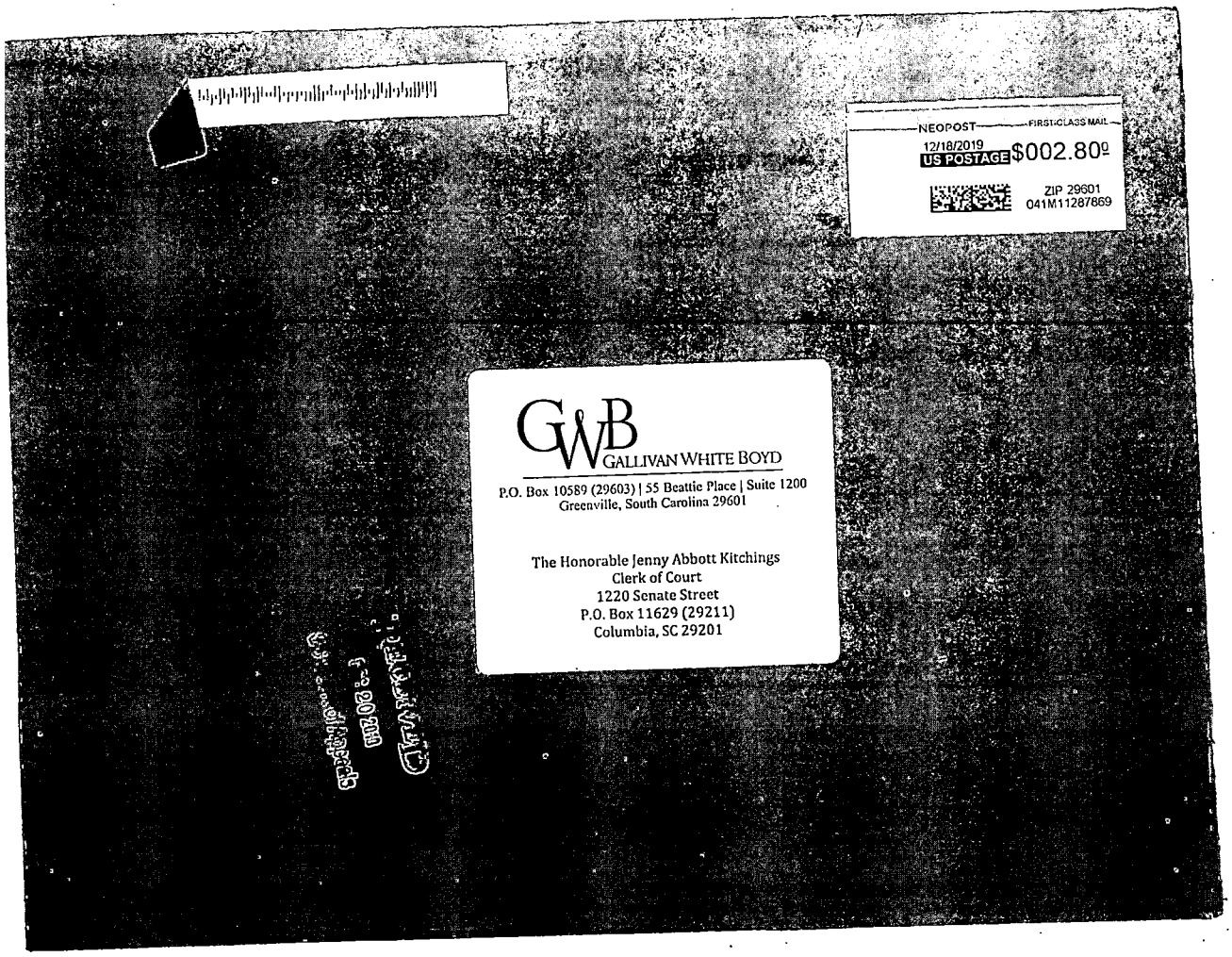

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