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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0035

PATRICK CHEFF,
Plaintiff/Appellee/Cross Appellant

v.

BNSF RAILWAY COMPANY, a Corporation
Defendant/Appellant/Cross Appellee

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY CAUSE NO. DV-08-1121
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I. INTRODUCTION AND SUMMARY

BNSF's arguments that it proved that Pat Cheff was negligent at trial are based exclusively on twenty pages of his own trial testimony. His testimony, however, does not support its arguments and certainly does not prove that he met the standard for a contributory negligence defense in FELA cases.

BNSF's argument that it is entitled to an offset for its previous payment similarly lacks merit because of the fact that the release which the railroad drafted states that the previous payment was consideration for settlement for numerous claims that were not litigated by Pat Cheff or a subject of the jury's verdict.

II. REPLY TO BNSF'S ARGUMENTS

A. THE EVIDENCE CITED BY THE RAILROAD DOES NOT SUPPORT A CONTRIBUTORY NEGLIGENCE DEFENSE.

The evidence that BNSF has relied upon consists of a general citation to twenty pages of Pat Cheff's trial testimony without explaining how it proves that he did something careless or added new dangers to the unsafe workplace. Its broad brush argument that the Court should allow it to blur the distinction between contributory negligence and assumption of risk and allow it to prove negligence by arguing it can "overlap" with assumption of risk notions is contrary to the FELA, its 1939 Amendment, and cases construing the impact of that amendment.

Unlike other cases, in FELA cases, contributory negligence is narrowly limited to situations in which there is evidence proving that the plaintiff committed

"a careless act or omission" which tends "to add new dangers to conditions that the employer negligently created or permitted to exist." *Kalanick v. Burlington Northern R. Co.*, 242 Mont. 45, 50, 788 P.2d 901, 904 (1990). Assumption of risk, or reporting to work and facing dangers inherent in the work, was abolished by a 1939 amendment to the FELA. *Tiller v. Atlantic Coast R. Co.*, 318 U.S. 54, 57, 63 S.Ct. 444, 446, 87 L.Ed. 610 (1943). Interpreting the 1939 amendment to the FELA, the United States Supreme Court stated that: "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment." *Tiller*, 318 U.S. at 58. Because of this, the United States Supreme Court warned lower courts that: "[u]nless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name." *Tiller*, 318 U.S. at 58, 63 S.Ct. at 447. That's what happened to Pat Cheff.

BNSF's reliance on causation cases in its brief (pp. 19-20) which allow the plaintiff to reach a jury on a "slim showing of negligence" or apply the same "in whole or in part" causation standard to the plaintiff and defendant does not address the railroad's burden to prove its defense of contributory negligence and related issues. Nor does the argument that a liberal interpretation of the FELA on causation issues somehow justifies interpretation of the FELA in a way that would broadly allow assumption of risk notions to go to the jury in disguise as contributory negligence. To the contrary, "[t]he United States Supreme Court has

repeatedly held that FELA is to be given a liberal construction in favor of injured railroad workers so that it may accomplish the humanitarian and remedial purposes intended by Congress. . . .[citations omitted]. This Court has followed federal case law in giving a liberal construction to FELA in favor of injured railroad workers. *Davis*, 282 Mont. at 245, 937 P.2d at 34 (citations omitted)." *Bevacqua v. Union Pacific R.R.Co.*, 1998 MT 120, ¶ 49, 289 Mont. 36, 960 P.2d 273.

The issue is simply the distinction between assumption of risk and contributory negligence. "This has been a common problem in FELA cases." *Kalanick*, 788 P.2d at 904.

> Although there is some overlap between assumption of risk and contributory negligence, generally the two defenses are not interchangeable. (Cite omitted). 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. (Cite omitted). Contributory negligence, in contrast, 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.
>
> The employee who enters the workplace for a routine assignment in compliance with the orders and directions of his employer or its supervising agents, who by such entry incurs risks not extraordinary in scope, is not contributorily negligent, but rather is engaging in an assumption of risk.
>
> Reporting to work or facing the risks inherent in one's job is the essence of assumption of risk.

Kalanick, 788 P.2d at 904 (quoting *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1316, 1317 (9th Cir. 1986)).

In *Kalanick*, the Court recognized that it was the railroad, not the railroad worker, which had a "high standard of care" and a non-delegable duty to provide a "safe workplace" under the FELA. *Kalanick*, 788 P.2d at 905 (citing *Tiller*). At trial, Burlington Northern nonetheless argued that the plaintiff should have used better discretion and not lifted heavy items, and, therefore, was negligent. The district court recognized that the evidence did not prove that the plaintiff created any new dangers and, therefore, granted the plaintiff's motion for a directed verdict. *Kalanick*, 788 P.2d at 905. On appeal, the Montana Supreme Court adopted the test set forth above and emphasized the importance of carefully examining the evidence in each case and not allowing the issue to go to the jury if the evidence does not support the defense. The danger is a reduction of damages based on outlawed notions in violation of the FELA.

> To impute negligence to Kalanick through instruction to the jury when no contributory negligence was shown would have been error. Because no contributory negligence was shown, the court correctly instructed the jury that Kalanick was not negligent "*as a matter of law*."

Kalanick, 788 P.2d at 905.

The same rationale from *Kalanick* applies in this case. BNSF presented no evidence to prove that Pat Cheff did something careless or added new dangers when he reported to work, put on his required safety shoes, and walked on an approved path that the railroad failed to maintain.

BNSF cites cases for the principle that it is entitled to instructions on its theories of the case. This is not true if the evidence does not support the defense. "If the defendant fails, however, to produce evidence of the plaintiff's lack of due care, then it is reversible error to give the instruction." *Birchem v. Burlington Northern R. Co.*, 812 F.2d 1047, 1049 (8th Cir. 1987) (citing *Wilson v. Burlington Northern Inc.*, 670 F.2d 780, 782 (8th Cir. 1982), *cert. denied*, 457 U.S. 1120 (1982)); *Borough v. Duluth, M.&.I.R. Ry.*, 762 F.2d 66, 69 (8th Cir. 1985).

In another FELA case involving a fall caused by an unsafe work environment, the railroad argued that the plaintiff was negligent because he stepped off a moving locomotive onto a platform that he knew was full of taconite pellets because he was not paying attention. *Borough v. Duluth, Missabe & Iron Range Railway Co.*, 762 F.2d 66, 68-69 (8th Cir. 1985). However, there was "no evidence to show he failed to use proper care in alighting from the train." *Borough*, 762 F.2d at 69. The court held that:

> A defendant is not entitled to reach the jury on an issue on which he bears the burden of proof on nothing but the incredibility of the plaintiff's testimony. Other evidence of the matter to be proved must be adduced. Thereafter, defendant may be assisted in sustaining his burden by the jury's disbelief of plaintiff's testimony.

Borough, 762 F.2d at 69 (quoting *Dixon v. Penn Central Co.*, 481 F.2d 833, 837 (6th Cir. 1973)).

In this case, BNSF's arguments are that Pat Cheff was negligent either for approaching the wrong door to the building or using the wrong walkway or not "taking note" that there was ice underneath the snowy, slushy path.

As to the first argument, in *Dixon*, the Sixth Circuit reversed a district court's decision to allow the contributory negligence issue to go to the jury where, as in this case, the railroad argued that the plaintiff could have used alternative means. The Court stated: "we attach no significance to the existence of alternate reasonable courses of action unless there is some showing that the course of action pursued was unreasonable." *Dixon*, 481 F.2d at 836.

> We have searched carefully for some evidence of contributory negligence because an appellate court should be reluctant to conclude from afar that the trial judge on the scene erred in a factual determination. Nevertheless, we find no evidence of contributory negligence here, and conclude it was error to submit that issue to the jury. Plaintiff's request for a peremptory instruction eliminating contributory negligence should have been granted.

Dixon, 481 F.2d at 837.

Pat Cheff was not unreasonable or careless in reporting to work or walking on the path towards the locker room. His supervisor, Doug Schuch, testified that on January 14, 2006, the walkway where Pat Cheff fell was not a prohibited walkway; Pat Cheff had never been told not to use that walkway; and the area was not fenced off until after he fell. (Tr. 323, l. 9 – 324, l. 3). The rationale that Mr. Schuch gave for later fencing the area was that BNSF did not want to "spend the

time and the effort to clean up the snow that accumulated in there." (Doug Schuch deposition, pp. 13, 15, 18-19, 21, 22, l. 16-22; Tr. 472, l. 20 – 473, l. 6). His own supervisor testified that he was not aware of any railroad rules that Pat Cheff violated. Schuch deposition, p. 66.

Joe Ormsby, another BNSF worker, testified that when he reported to work, he used the same path that Pat Cheff used 99% of the time. (Tr. 498) Every winter he complained about ice being a problem, even while wearing the same type of safety overshoes that Pat Cheff was wearing. (Tr. 516) His testimony confirmed that it was not until after Pat Cheff fell that the railroad put up a fence which prohibited workers from walking through that area in the winter. (Tr. 518)

The other argument, that Pat Cheff did not "note" the ice, is similarly not supported by the evidence or the law. On cross-examination, Pat Cheff acknowledged that he knew that there was snow and ice in Whitefish in the winter. He testified that he saw snow on the ground when he pulled into the parking lot. In fact, it was because of this that he followed the railroad's safety rules and put on the BNSF required safety footwear before he got out of his truck. (Tr. 183-184) Unlike the cases that BNSF relies upon, he did not testify that he failed to use safety devices or was not paying attention. His testimony was that he walked toward the building on a snowy and slushy walkway that was packed from previous foot traffic and that he was aware of these conditions. He did not see any

ice because it was underneath the snow or slush on the pathway. (Tr. 190, 192, 195) He noticed that there was puddling, said that "my eyes were observing me walking" (Tr. 195) and explained that he did not see any ice because "there was snow and there was the puddling of water and, you know, it was slush, excuse me. And so, I was walking, I could not see the ice." (Tr. 196, l. 17-20). The icy conditions existed because BNSF did not properly maintain the walkway, shovel snow, use sand, ice melt, or fence the area until after Pat Cheff fell. (Tr. 254-255, 265)

Pat Cheff in reporting to work did nothing careless. He also had the right to assume that he was provided with a safe workplace.

A railroad employee,

> [H]ad the right to assume that defendants had exercised proper care in braking the cars and he did not assume the risk of their negligence in that respect. *Chesapeake & Ohio Railroad Co. v. Proffitt*, 241 U.S. 462, 36 S.Ct. 620, 60 L.Ed. 1102. He was not bound to exercise care to discover danger which resulted from the employer's negligence.

Armstrong v. Chicago & W.I.R. Co., 183 N.E. 478 (Ill. 1932), *cert. denied*, 289 U.S. 724 (1933).

BNSF's authorities do not support the broad arguments that are being made as justification for allowing the contributory negligence issue to go to the jury. *Norfolk Southern v. Ferebee*, 238 U.S. 269 (1915), does not hold that contributory negligence must be submitted to the jury because it is automatically "interwoven"

with damages. In fact, in *Ferebee*, the worker's contributory negligence was not submitted to the jury because the railroad worker, who had also fallen, "had nothing to do with the loss of the steps and was not guilty of contributory negligence in failing to see that they were missing. His conduct at the time of his fall could not, therefore, affect the amount of the verdict . . ." *Ferebee*, 238 U.S. at 273. In *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 978 (8th Cir. 1995), the railroad presented evidence from other co-workers and supervisors that the plaintiff, who alleged he suffered poisoning from welding fumes, did not always use exhaust equipment, failed to use ventilation, and admitted he may not have read warning labels that were available to him. Even then, the issue was deemed a "close question." *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269 (3rd Cir. 1995) used a different criteria than *Kalanick* in terms of delineating what is considered assumption of the risk. W*ise v. Union Pacific R.R.Co.*, 815 F.2d 55 (8th Cir. 1987), does not address the distinction between contributory negligence and assumption of risk. And, the evidence in that case included testimony that the plaintiff did not look at the ground or steps as he was stepping off a ladder on a railroad car, was wearing "western" boots, not safety boots, and contributed in other ways to his fall. *Wise*, 815 F.2d at 57.

Unlike the cases cited by BNSF, Pat Cheff testified that was watching where he was walking. He also testified that he was wearing the approved footwear.

According to his own supervisor, he did not violate any railroad safety rules. He did nothing other than try to go to work through conditions BNSF had allowed to exist without regard to his or other employees' well being.

B. THE DISTRICT COURT ERRED IN ALLOWING A $300,000 SETOFF.

BNSF has not supported its burden of proving how its previous payment of $300,000 for the many claims it included in its release can be offset from a jury verdict that pertained to only one of the claims in the release. Its brief entirely ignores the language of the release, which was the sole evidence it relied upon for an offset. Sections 28-2-1715, and 1716, Mont. Code Ann., do not apply to a release that included other claims. Even if they did, they only allow an offset to do "equity" in cases in "which justice may require." Where the previous payment was consideration for many claims, which were not litigated, justice requires that the previous payment should not be offset.

Without explaining how, BNSF asserts that the cases Cheff cited "which involved *collateral source offsets*, are inapposite." Appellant's Response Br. at 22. Whether deemed collateral sources or advance payment, a jury's verdict cannot be offset for a previous payment of any kind unless the defendant can prove it was for the same damages awarded by the jury; to allow otherwise misses the whole point of allowing an offset. *Tucker v. Farmers Insurance Exchange*, 2009 MT 247, ¶ 58-59, 351 Mont. 448, 215 P.3d 1 disallowed an offset for a previous settlement

because the defendant failed to present "some positive proof" it was for the "same damages awarded by the jury." In *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 375, 916 P.2d 122, 141-42 (1996), the Court actually stated "it is not necessary that we resolve whether death benefits from the Veterans' Administration are included within the statutory definition of 'collateral source'" because the general verdict made it impossible for a court to allow an offset since there was no way to determine the same elements of damage were included in the verdict.

The same rationale applies here because BNSF chose to insert other claims into its release. Absent "some positive proof" from the railroad as to how much was allocated among the many claims, an offset should not be allowed.

Hogue v. Southern Ry. Co., 390 U.S. 516, 518 (1968) did not address a release that included numerous claims such as the one here, but implicitly recognized that the sum that a railroad has previously paid to settle the same claim that is later litigated need not be paid back before the lawsuit can proceed (let alone with interest as the railroad argues elsewhere) but rather is to be deducted from any award by the jury, again, presumably for the same claim. The offset issue in this case, however, with very broad release language including many claims was not an issue in *Hogue*.

Contrary to the District Court's ruling, the release language itself proves that BNSF was claiming to have settled more than our claim on January 14, 2006. Paragraph 2 says consideration was paid for all the claims in the release, including the January 14, 2006 fall that the railroad continues to deny actually happened. Paragraph 6 states:

> It is further understood that this Release cannot be in any way modified except in writing executed by all parties and this release is and shall remain final and absolute as an indivisible lump-sum compromise settlement for any and all claims, damages, injuries, illnesses or causes of action described herein.

Release and Settlement Agreement, App. 12 to Cheff's Opening Brief.

The release, according to other paragraphs that BNSF drafted included "claims" for chemical exposure, labor and employment matters, emotional stress, cumulative trauma, and other claims against not only BNSF which is the party to this action but also its officers, directors, employees, and agents who are not parties. Release, Paragraph A. Paragraph B added noise exposure, smoke, fumes, dust, vapors, gases, and other chemicals. Paragraph C added even more claims.

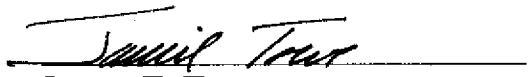
III. CONCLUSION

Pat Cheff's testimony, the only testimony that BNSF has cited, does not prove that he did something careless or added new dangers to the workplace. Therefore, under the narrow parameters of a contributory negligence defense allowed in FELA cases, the offset should not be allowed. BNSF should not be

allowed to offset its previous payment because the release, that it drafted, very broadly includes a number of other claims that were not litigated and were not a subject of the jury's damage award.

DATED this 15th day of July, 2010.

TOWE LAW OFFICES



James T. Towe

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of July, 2010, a true and exact copy of the foregoing document was served on the Appellant by mailing a copy, postage pre-paid to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 3,154 words, including all text, excluding table of contents, table of citations, certificate of service and certificate of compliance.

Dated this 15th day of July, 2010.

Robin Catterton

Robin A. Catterton