Appeal No. WD87866

In The Missouri Court of Appeals
Western District

RONNIE INGLIS
Plaintiff/Appellant

vs.

BNSF RAILWAY COMPANY,
Defendant/Respondent

Appeal from the Circuit Court of
Platte County, Missouri
Case No. 21AE-CC00055

APPELLANT'S BRIEF

Christopher H. Leach
MO #34147
Hubbell Law Firm, L.L.C.
1100 Main Street, Suite 2323
Kansas City, MO 64105
Phone: (816) 221-5666
Fax: (816) 221-5259
cleach@hubbellfirm.com

Phillip G. Greenfield,
MO #37457
GM Law PC
1201 Walnut, Suite 2000
Kansas City, MO 64106 Phone:
(816) 471-7700
philg@gmlawpc.com

Nicholas Hinrichs, MO # 63506
Hinrichs & Scott Law Firm
1100 Main Street, Suite 2600
Kansas City, MO 64105
nick@hsinjuryfirm.com

Attorneys for Appellant

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STATEMENT OF JURISDICTION

The Missouri Court of Appeals, Western District, has jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution. None of the issues on appeal are within the exclusive jurisdiction of the Missouri Supreme Court.

This appeal arises from a Federal Employer Liability Act negligence action brought in the Circuit Court of Platte County Missouri by Appellant against Respondent. On October 16, 2024, the jury returned a verdict in favor of Appellant awarding him $3,000,000.00 in total damages and assessing 70% of the fault to Appellant.[1] On October 28, 2024, the trial court entered judgment in the amount of $900,000.00 after reduction of the total amount of Appellant's damages by the percentage of fault assessed by the jury.[2]

On November 27, 2024, pursuant to Mo. R. Civ. P. 78.04, 78.07 and 81.05, Appellant timely filed Plaintiff's Motion to Amend or Modify Judgment to Apply New or Additional Danger Requirement of the FELA Contributory Negligence Defense.[3]

[1] D28 p. 1; App 105
[2] D34 pp. 1-3; App 1-3
[3] D37 pp. 1-19

On February 20, 2025, the trial court denied Plaintiff's Motion to Amend or Modify the Judgment[4] and entered its Amended Judgment.[5]

On March 3, 2025, Appellant timely filed a Notice of Appeal from the Amended Judgment in compliance with Missouri Rule of Civil Procedure 81.04, which requires that a notice of appeal be filed no later than ten days after the Amended Judgment becomes final.

[4] D43 p. 1; App 4
[5] D45 pp. 1-3; App 5-7

STATEMENT OF FACTS

I. Nature of the Case

The underlying action was brought by Appellant as the plaintiff below under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et sequitur* (the FELA).[6] It was brought against Respondent, BNSF Railway Co., as the defendant below for injuries and damages arising out of a collision between Respondent's train and Respondent's section truck that occurred at Respondent's private railroad crossing on April 6, 2018.[7] Appellant was the driver of the section truck.

Appellant claimed that Respondent negligently created and allowed so many dangers at the crossing that he could not reasonably give attention to all of them and that, as a result, he was unable to give adequate attention to one of the dangers and it injured him. That danger was the possibility of oncoming train traffic on one of the tracks from one of the directions at the crossing.

Respondent did not contest that the dangers existed at the crossing, and it did not contest that Appellant was required to give all of the dangers his attention as he operated the section truck. Respondent claimed that Appellant nonetheless should have given more attention to the possibility of the one danger that injured him.

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[6] D2 p. 2 (Petition for Damages).
[7] App 106; Tr. 670:16-18 (Employee Personal Injury/Occupational Illness Report); Tr. 439:13-15, 602:4-9.

Over objection throughout the course of the litigation and at trial, including at the jury instruction conference, Appellant objected that Respondent's defense sought to hold Appellant liable for the danger Respondent created at the crossing, and therefore, it was an improper delegation of Respondent's non-delegable duty to Appellant and an impermissible assumption of risk defense, not a proper contributory negligence defense.

The Trial Court allowed Respondent to nominate the defense a contributory negligence defense and submitted it to the Jury.[8] The Jury found that Appellant suffered three million dollars ($3,000,000.00) in damages and was seventy percent (70%) contributorily negligent under Respondent's defense.[9] The Trial Court applied the Jury's findings in its judgment and reduced Appellant's damages by the seventy percent (70%) contributory negligence.[10]

II. The Crew and Their Assigned Work

At the time of the collision, Appellant was driving a section truck[11] in the employ of Respondent[12] at Respondent's private railroad crossing[13] that joins

[8] D27 p. 13; App 104
[9] D28 p. 1; App 105
[10] D28 p. 1, App 105 (Verdict); D34 p. 1-3, App 1-3 (Entry of Judgment); D45 p. 1-3, App 5-7 (Amended Entry of Judgment).
[11] A section truck is a railroad maintenance work truck. App 107, Tr. 943:23-944:16, is a photograph of the section truck taken immediately after the collision.
[12] Tr. 619:9-16 (Appellant was hired in 1998).
[13] Tr. 1106:2-5 (owned by Respondent), 1040:6-15 (private crossing), 467:24-468:6 and 1105:24-1106:2 (private crossing owned by Respondent).

Missouri Highway 45 east of Leavenworth, Kansas.[14] In the section truck were three (3) co-workers[15] whom Respondent had assigned, along with Appellant, to pick up rail[16] that Respondent stored at the crossing.[17] Appellant and the other three (3) members of the crew were to take the rail to Parkville, Missouri,[18] where they would replace a broken rail with the new rail.[19]

The crew's day began at 2:00 to 2:15 a.m. when their supervisor, Roadmaster Martin Feighner, called them for work.[20] Each crew member was assigned a particular job on the crew. Mr. Tim McCourt was assigned as the employee-in-charge, otherwise known as the EIC or foreman.[21] Appellant was the truck driver.[22] Mr. Tighe Gilkerson was the grinder,[23] and Mr. Jonathan Saunders was the laborer.[24] They met together at the St. Joe depot where they got into the

[14] Tr. 393:20-394:11, 399:24-40:13, 480:17-21, 488:17-22, 489:9-25 (crossing joins Highway 45); Tr. 354:22-355:7, 958:14-19, 1069:23-1070:1(East Leavenworth).
[15] Tr. 411:16-412:2.
[16] Tr. 354:21-355:7 (Respondent's opening statement), 908:20-21, 1062:8-21.
[17] Tr. 391:16-392:6, 520:4-11.
[18] Tr. 396:24-397:4, 466:16-467:23, 922:10-21.
[19] Tr. 396:20-397:8, 1370:16-23 (Respondent's closing argument).
[20] Tr. 923:4-22.
[21] Tr. 611:8-12 (employee in charge), 609:2-14, 610:23-611:15 (EIC), 609:15-18 (foreman), 494:3-15 (foreman and employee in charge), 924:4-22 (Roadmaster Feighner chose Mr. McCourt to be the EIC because of his special proficiency with administrative duties that would be needed to be done during the course of the crew's work that day).
[22] Tr. 354:16, 375:13 (Respondent's opening statement), 546:21-24.
[23] Tr. 906:13-14.
[24] App 106 (personal injury report lists Mr. Saunders as a laborer).

section truck and headed to the crossing.[25] Appellant sat in the driver's seat, Mr. McCourt sat in the front passenger seat, Mr. Saunders sat behind Mr. McCourt, and Mr. Gilkerson sat behind appellant.[26]

Railroad work can be dangerous.[27] In order to protect employees from dangers in the work Respondent assigns them, Respondent promulgates safety rules.[28] These rules include the requirement that supervisors provide employees job safety briefings "at the beginning of the shift," "before changing jobs," "as conditions change,"[29] "(b)efore beginning work," "(b)efore performing new tasks," and "(w)hen working conditions change."[30] The job safety briefing is required to include "discussion of the tasks to be performed," "identifying present exposures

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[25] Tr. 396:23-397:3.
[26] Tr. 411:16-412:2.
[27] Tr. 445:22-446:2 (it is not a place one would take their children; it is very dangerous), 717:4-7.
[28] Railroad rules admitted into evidence: Tr. 422:3-22 (Maintenance of Way Operating Rule 1.1.2), 428:25-429:4 (Maintenance of Way Safety Rule S-12.1.2), 524:3-14 (Maintenance of Way Operating Rule 11.0), 539:3-9 (complete set of Maintenance of Way Safety Rules), 603:7-15 (Maintenance of Way Operating Rule 1.20), 689:5-9 (Maintenance of Way Operating Rule 1.6), 956:18-23 (Maintenance of Way Operating Rules 11.0-11.4), 1141:23-1142:8 (Maintenance of Way Safety Rule 11.20). The purpose of the railroad rules is employee safety: Tr. 914:16-18, 1015:25-1016:18.
[29] App 108-109, Tr. 491:16-492:17 (Maintenance of Way Safety Rule S-1.1), 539:3-9 (complete set of Maintenance of Way Safety Rules admitted into evidence).
[30] App 110, Tr. 422:13-423:24 (Maintenance of Way Operating Rule 1.1, discussed in context of Maintenance of Way Operating Rule 1.1.2); App 111-112, Tr. 956:15-957:23. (Maintenance of Way Operating Rule 11.4, job safety briefing also required "before any roadway worker or equipment fouls a track").

and the associated risks that are or will be present in the tasks," and "methods to control or minimize any such risks."[31] As "exposures and… associated risks," any dangers at the crossing were subjects for job safety briefing.[32]

On the morning of the collision, Roadmaster Feighner provided job safety briefings to other crews gathered at the depot,[33] but he did not provide a job safety briefing to the crew he assembled under Mr. McCourt.[34] He did not provide them a job safety briefing "at the beginning of (their) shift."[35] According to Roadmaster Feighner, he expected Mr. McCourt to provide the crew its job safety briefings[36] because Mr. McCourt was the crew's EIC.[37] Mr. McCourt, however, testified that he did not believe he was the crew's EIC.[38] Mr. McCourt testified that the briefing is supposed to be given by the person in charge, and that this was Roadmaster Feighner.[39] Had Roadmaster Feighner conducted a job safety briefing, the briefing

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[31] Footnote 29.
[32] App 108-109, Tr. 491:16-492:17 (Maintenance of Way Safety Rule S-1.1).
[33] Tr. 929:7-20.
[34] Tr. 397:21-23, 399:11-19, 908:2-8.
[35] App 110, Tr. 422:13-423:24 (Maintenance of Way Operating Rule 1.1, discussed in context of Maintenance of Way Operating Rule 1.1.2);
[36] Tr. 928:14-21 (Roadmaster Feighner's expectation was that Mr. McCourt would perform a job safety briefing "when you go to pick up the rail").
[37] Tr. 609:2-18 (Roadmaster Feighner knew Mr. McCourt was the EIC / foreman), Tr. 483:25-494:15 (Federal Railroad Administration Railroad Safety Oversight Manager (RSOM), Mr. Joe Lydick, explaining why Mr. McCourt was the EIC / foreman).
[38] Tr. 398:10-399:10 (according to Mr. McCourt the crew did not have anyone performing any supervision at the crossing).
[39] Tr. 397:24-398:9.

would have included who the EIC was, and therefore, who was responsible for providing the crew their job safety briefings.[40] Nevertheless, Mr. McCourt should have understood he was the EIC.[41]

III. The Crossing

The crossing where Respondent assigned the crew to pick up the rail was an employee workplace[42] that consisted of three railroad tracks that ran north and south,[43] parallel to and west of Highway 45.[44] The eastmost track, the one closest to the highway, was Main 1.[45] The middle track was Main 2,[46] and the westmost track was the House Track.[47] The workplace consisted of these tracks, the apron at

[40] Footnote 29, above ("The following are essential to any job safety briefing: … Assignment of duties and responsibilities"); Tr. 493:11-24, 495:5-496:8 (rules require designation of the EIC in the job briefing), 1102:9-22 (in the absence of rule designation of the EIC, Respondent's expert testified, "I heard that Mr. McCourt was EIC," there was "confusion" in the litigation record as to who the EIC was, but it was clear that Appellant was not the EIC).
[41] Tr. 611:8-15 (Mr. McCourt would have known he was the EIC).
[42] Tr. 391:22-392:6, 469:8-12 (workplace where Respondent's rules apply), 495:21-496:8, 526:4-527:5.
[43] Tr. 470:11-17 (three tracks); App 113, Tr. 391:3-15; Tr. 391:3-394:8 (referring to photograph oriented to the north, thorough identification of the physical components of the scene of the collision); *See also* App 114, Tr. 1113:15-24 (Respondent's expert's annotated aerial photograph of the scene).
[44] *Id.*; Tr. 521:14-17, 1030:22-1031:4.
[45] App 113 Tr. 391:3-15; Tr. 392:7-22, 394:4-8 (App 121, photograph oriented to the north, Main 1 is the track to the right on the photo).
[46] *Id.*
[47] *Id.*

Highway 45,[48] the crossing planks that covered Main 1 and Main2,[49] and a stop sign approximately 200 (two-hundred) feet southwest of the crossing.[50] The stop sign directed employees where to stop for the crossing when they were leaving the area.[51]

This workplace contained many dangers. Some of the dangers were inherent and others were added by Respondent. Dangers inherent in this workplace were:

1. The possibility of trains coming from the north on Main 1.[52]
2. The possibility of trains coming from the south on Main 1.[53]
3. The possibility of trains coming from the north on Main 2.[54]
4. The possibility of trains coming from the south on Main 2.[55]

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[48] App 115, Tr. 479:3-4; 607:1-20 (close clearance at apron is "structure" or "obstruction" "where clearances are close" under Respondent's rules).
[49] App 116-119, Tr. 1050:24-1051:20 (Trial Exhibits 709.47A, 709.48A, 709.49A, and 709.50A); App 114, Tr. 402:19-404:9.
[50] App 121, Tr. 469:25-470:23.
[51] *Id.*; Tr. 471:24-472:2.
[52] App 122, Tr. 603:4-15 (Respondent's Maintenance of Way Operating Rule 1.20 required employees to "expect the movement of trains, engines, or cars, or other moveable equipment at any time, on any track, and in either direction"). The danger of trains coming from either direction on any of the three tracks at the crossing was a central focus of the evidence at trial. Tr. 412:3-11, 453:4-11, 473:24-474:16, 603:4-604:7, 605:19-24, 606:9-607:10, 611:22-612:7, 614:7-20, 615:11-18, 644:15-645:9, 688:6-12, Tr. 913:1-12, 934:16-19, 1033:23-1034:9, 1118:7-14, 1143:5-16.
[53] *Id.*; Tr. 414:12-18, 417:11-16, 418:8-19, 418:25-419:23, 420:1-6, 473:24-474:9, 995:16-19, 1091:4-11, 1091:19-22.
[54] Footnote 52.
[55] Footnote 53; Tr. 473:24-474:9.

5. The House Track was a place where trains would pull onto for various reasons.[56] It also was a place Respondent would send maintenance work trains and other on-track maintenance equipment to be stored during work projects in the area. Therefore, the House Track was live track,[57] and documents showed that it would be used for maintenance equipment storage around the time of the collision.[58] Because the House Track was live, inherent dangers on the House Track were:

    a. The possibility of trains and other on-track equipment coming on the House Track from the north.[59]

    b. The possibility of trains and other on-track equipment coming on the House Track from the south.[60]

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[56] Tr. 520:4-11.

[57] When it successfully argued to exclude certain, proffered rebuttal evidence, Respondent emphasized to the Trial Court that the House Track was live track: "First of all, we never once, ever, said that it wasn't live track." Tr. 1286:2-3.

[58] Tr. 969:11-971:22 (TCM section of GTM document shows House Track at time of collision intended to receive maintenance equipment), Townlian Tr. 26:12-26:21 [Supplemental Transcript] (material at the crossing at the time of the collision was part of the maintenance project that was to take place in the area). Referring to the House Track as "it," and referring to the track maintenance work that was being performed in the area as part of a "capital project," Respondent stressed that, "In fact, Mr. Norman put on extensive testimony that it was routinely being used by the Maintenance of Way department because of this major capital project." Tr. 1286:3-6.

[59] Footnote 52; Tr. 1067:20-1068:19.

[60] Footnote 53; Tr. 1003:5-18.

6. The section trucks that used the crossing were very large,[61] long,[62] and slow.[63] They were even longer when they had rail on the rack on top of them.[64] The section truck involved in the collision was effectively the length of the over forty-two (42) foot long rail on top of it.[65] Their speed and size affected their maneuverability when drivers needed to merge them into highway traffic as they left the crossing.[66]
7. Difficulties in seeing trains approaching:
    a. Headlights from cars on the highway that ran parallel to the tracks could blend with train headlights, making the train headlights harder to distinguish.[67]

[61] Footnote 4.
[62] Tr. 416:3-4 (section truck approximately forty (40) feet long).
[63] Tr. 1087:21-1089:21 (section truck traveling three (3) to four (4) miles per hour as it crossed the crossing), 11:03:22-1104:5 (Appellant "stepped on the gas" when he was alerted to the trains approach): App 124-126 Tr. 414:24-415:4 (video taken inside the cab of the section truck at times -1.00, -0.75, and -0.50, being the second and fractions of a second before the collision, show Appellant accelerated to 7 (seven) miles per hour).
[64] Tr. 416:5-10.
[65] Tr. 480:2-16 (effective length of section truck).
[66] Tr. 480:2-25 (effective length of section truck with rail on top created a "headache" when attempting to merge into highway traffic at the crossing).
[67] Tr. 521:14-17, 1096:7-1097:8.

b. Certain atmospheric conditions, such as the early morning dusk conditions at the time of the collision, could make it harder to see trains.[68]

c. For section truck drivers, the view out the passenger window to their right was constrained by the size of the window,[69] the mirrors mounted outside the passenger side door,[70] and any coworker sitting in the front passenger seat.[71] At the time of the collision, Mr. McCourt was sitting in the front passenger seat,[72] and the striking train approached from the passenger side.[73]

8. Difficulties hearing trains approaching:

a. Because the crossing was private, Respondent did not require trains to blow their horn to warn of their approach there.[74] In this case, the striking train did not blow its horn until the collision was imminent.[75]

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[68] Tr. 521:11-13.
[69] App 127, Tr. 645:23-25 (photo of view toward passenger side window from driver side of section truck).
[70] Tr. 646:17-23 (Appellant noting that the mirrors in the photo in App 127 appear to be pushed up farther than they would have been when in use).
[71] Tr. 646:24-647:4.
[72] Tr. 411:16-412:2.
[73] Tr. 417:11-16.
[74] Tr. 997:15-18.
[75] Tr. 1000:24-1001:3 (striking train's engineer started blowing the horn at the culvert south of the crossing), 1036:5-15 (striking train travelling seventy-eight feet (78) per second, engineer started blowing the horn at the culvert approximately five-hundred fifty (550) feet to seven-hundred (700) feet from the crossing),

b. During certain times of the year and in certain weather conditions, employees will have the section truck windows up. The collision happened in the early morning hours in April.[76] It was unseasonably cold,[77] and the section truck windows were up.[78] It is more difficult to hear trains with the windows of the section truck up.[79]

Dangers Respondent added to the crossing were:

1. Respondent erected a stop sign that directed employees where to stop for the crossing,[80] but Respondent placed the sign approximately two-hundred (200) feet away from the crossing and faced it toward the south.[81] This required drivers to stop for the crossing with their section trucks parallel to the tracks

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1084:4-12 (striking train travelled approximately eight (8) seconds from the culvert to the point of collision).

[76] App 106, Tr. 670:16-18 (personal injury report date of collision April 6, 2018, at 6:30 a.m.).

[77] Tr. 924:11-12 ("It's early in the morning and it was unseasonably cold that morning").

[78] Tr. 412:19-20, 433:12-15.

[79] *See* Tr. 433:6-19 (failure to hear the train associated with the fact that the windows were up).

[80] Tr. 468:25-469:6 (Respondent decided where to put stop sign), 1114:12-1115:13 (Respondent had standard plan for stop sign placement but did not place the stop sign where the standard plan indicated it should be placed), 469:24:470:23, 471:24-472:2 (section truck drivers required to stop at the stop sign).

[81] Footnote 50; App 114.

and facing north.[82] In this position facing this direction, the driver could not see trains coming from the south.[83]

2. The design of the crossing did not allow a driver to approach the railroad tracks at a right angle "to allow for optimal viewing of potential approaching movements."[84] Respondent designed the crossing such that the drive surface west of the House Track was too narrow for a section truck to approach the House Track at a right angle.[85]

3. The design of the crossing did not allow a driver to stop at a right angle to the tracks to look and listen for trains there.[86] Respondent designed the

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[82] Tr. 411:16-412:7 (the way the stop sign faced, employees were facing north at the stop sign), 473:24-474:9 (at the stop sign employees face north, parallel to the tracks).

[83] Tr. 412:3-11. At the stop sign the view through the mirrors was too limited to see oncoming train traffic from the south through them. Tr. 473:24-474:16, 644:22-645:8, 646:2-14. In closing argument, Appellant noted that positioning section trucks facing north and parallel to the tracks was the worst possible position for seeing train traffic coming from the south. Even positioning the section truck perpendicular to and away from the tracks would be preferrable because the driver would be able to look outside his window to his left where he would have an unobstructed view of oncoming train traffic. 1379:1-22.

[84] Respondent's Maintenance of Way Safety Rule S-12.1.2, Subparagraph 1, required employees to approach "as close to a right angle to the track as practical to allow for optimal viewing of potential train movements." App 128, Tr. 428:18-429:4.

[85] Tr. 541:22-542:4. App 114, Tr. 1113:15-24 is a drone photo of the area from the stop sign to the House Track. The lighter area in the gravel surface of the driving area shows where section trucks drove in between the stop sign and the House Track. The degree to which the angle of approach diverges from a right angle can be seen in the drive path shown in the photo.

[86] Tr. 413:22-414:1.

crossing such that section truck drivers could not "square up" at a right angle to the House Track.[87] If a section truck squared up at the House Track, either its rear end would fall off of the driving surface to the west,[88] or it would be in the foul of the House Track.[89]

4. The House Track was too close to Main 2 for a driver to be able to cross the House Track and then to stop at Main 2 without either fouling the House Track or fouling Main 2.[90] Stopping in the foul of the House Track would put the section truck in a position in which it could be struck by trains or on-track equipment moving on the House Track. It also would violate Respondent's rule that prohibited drivers from stopping in the foul of a track after they cross it.[91] Because there was insufficient room to stop after crossing any of the three (3) tracks and then the highway without fouling the

[87] *Id.,* Tr. 637:18-638:5.
[88] Tr. 733:25-734:8.
[89] Tr. 637:18-638:5.
[90] Footnote 62 (section truck approximately forty (40) feet long without rail on top); footnote 65 (section truck effectively the approximate forty-two (42) foot length of the rail on the rack on top of it); App 115, Tr. 478:17-479:4 (approximately forty-three (43) feet between the House Track and Main 2, approximately thirty-five (35) feet between the foul of the House Track and the foul of Main 2). Stopping at Main 2 clear of the foul line would put a section truck in the foul of the House Track. Tr. 480:2-25, 488:17-22, 690:5-11, 910:14-23.
[91] App 128 Tr. 428:18-429:4 (Maintenance of Way Safety Rule S-12.1.2, Subparagraph 2, "Stop before crossing the track(s), unless the vehicle or off-track equipment is foul of a previously crossed track").

track just crossed,[92] once a driver started across the House Track the rule required him to keep driving until he crossed all the tracks.[93]

a. This meant that the driver had to attend to the operation of the section truck and all the dangers at the crossing while he was in motion, moving through the dangers.[94]

b. This removed the "stop" component of the "stop, look, and listen" formula for crossing safety.[95] As a result, as a driver moved across the crossing, stationary things in his field of view would move and make it harder to distinguish them from moving things, such as moving trains.[96] This would increase the danger that a driver would fail to see a moving train.[97]

    i. This effect was demonstrated when the crew's EIC, Mr. McCourt, was in the moving section truck and looking directly

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[92] App 114, Tr. 1113:15-24 (eight and eight tenths (8.8) feet between the tracks of Main 2 and Main 1); App 115, Tr. 478:17-479:4 (between approximately thirty-six (36) feet to forty (40) feet between the foul of Main 1 and the foul of the highway).
[93] Tr. 429:7-23, 480:17-25, 488:17-22. Respondent told Trial Court, "We have not once said that rule 12.1.2 doesn't apply, Mr. Brookings punctuated at the very end, of cross it applies").
[94] Tr. 429:24-431:11, 480:22-481:6, 489:9-25, 639:24-431:11.
[95] Tr. 490:1-21, 1013:7-1014:15 (stop, look, and listen principle of crossing safety and its importance); Tr. 539:23-540:16 (rule against stopping in the foul of crossed track applied to crossing at issue resulted in removing the stop component of the stop, look, and listen formula).
[96] Tr. 490:14-491:3.
[97] *Id.,* Tr. 1015:3-19.

at the striking train as it approached but failed to see it until it was too late to avoid the collision.[98]

5. Improper installation of concrete crossing planks over the top of Main 1 allowed the planks to migrate and open up a gap between them.[99] The gap presented a danger to section trucks because a front tire could become stuck in the gap and result in the truck being struck by a train.[100] Respondent was aware of the gap for as long as a month before the collision,[101] but Respondent did not fix the gap until after the collision.[102]

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[98] Tr. 417:10-419:8 ("No idea" why he did not see the striking train when he was looking in the direction of it), 423:4-10 (believed he was being alert and attentive even though he did not see the train coming toward him when he was looking in the direction of it).

[99] Tr. 403:19-404:20, 481:16-482:8, 484:16-486:6, 1056:9-14, 1129:22-1130:4.

[100] EIC McCourt recognized that the gap created a danger. Tr. 406:24-407:10. When they saw it as the crew entered the crossing, a member of the crew sarcastically said, "isn't all this fun." Tr. 400:18-401:23. This meant that the crew was "concerned with not putting the tire in that gap and being stuck on the train tracks." Tr. 401:24-402:4, 405:2-4 ("It looked like it was large enough that a tire could fall off in it"). EIC McCourt believed that the gap caused the collision by distracting the crew. Tr. 404:21-405:4 ("I think it caused us to be distracted from potentially seeing the train coming down the track"). When he saw the gap and recognized it as a danger in the work area, EIC McCourt should have conducted a job safety briefing. App 108-109, Tr. 491:16-492:17 (Maintenance of Way Safety Rule S-1.1). Because it was a danger, the gap required driver attention to avoid it when driving across the crossing, thereby distracting drivers from other dangers at the crossing. Tr. 486:7-15.

[101] Tr. 1135:18-1136:18.

[102] Tr. 1135:10-17. Before it fixed the gap after the collision, Respondent did not measure the gap. 486:16-487:6, 1130:17-24.

6. The space at the crossing entrance / exit between Main 1 and the highway was too short for section trucks leaving the crossing to stop before merging into highway traffic. If section trucks stopped there, they either would be in the foul of Main 1, in violation of the rule prohibiting stopping in the foul of a crossed track and in a place where they could be hit by a train, or they would stick out into the highway.[103] Therefore, as the short distance and the rule prevented drivers from stopping their section trucks between the House Track and Main 2, the short distance and the rule prevented drivers from stopping between Main 1 and the highway when attempting to merge into highway traffic.[104]

    a. This meant that a driver had to plan how he was going to merge into the highway traffic while he was driving across the crossing.[105]

[103] App 115, Tr. 478:17-479:4 (between approximately thirty-six (36) feet to forty (40) feet between the foul of Main 1 and the foul of the highway); Tr. 480:17-481:6, 607:15-20, 639:3-7.
[104] Footnote 93.
[105] Tr. 639:24-640:8 (Appellant concerned with the volume of traffic on the highway at that time of the morning), 489:9-25 ("they were concerned about entering Highway 45"), 490:14-491:3, 1373:3-13 (in closing argument, Respondent refers to Appellant looking at the highway traffic), 607:15-20 (highway considered a close clearance hazard under Respondent's rules), 453:19-21 (Respondent suggested that the crew had "options like flagging on the highway").

The number of dangers at the crossing exceeded the amount of attention a section truck driver reasonably could give all of them.[106] This created a danger that while a driver paid attention to some of the dangers, another danger would not receive adequate attention and would injure him.[107] This is what happened in this case.[108]

Nothing required Respondent to add these dangers to the crossing. The crossing was private and wholly owned by Respondent.[109] There was no legal or other standard that required Respondent to do the things that created the additional dangers.[110] The only legal standard that applied at the crossing was the FELA duty Respondent owed the employees it assigned to work there.[111] Respondent could

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[106] App 129, Tr. 1458:18-1459:25, is Exhibit No. 1 from the post-trial hearing. It is Respondent's trial Exhibit No. 712.13 on which Appellant points out and labels each of the inherent dangers and the dangers Respondent added to the crossing. Tr. 713:19-715:18 (human beings such as Appellant only have so much attention to give, a crossing should be designed to require only the amount of attention a human being can give to dangers there, Appellant and the co-workers did their best with the amount of attention they had to give at the crossing, the crossing required too much of Appellant and the crew).

[107] Tr. 486:10-15 (effect of all the dangers was to distract Appellant), 489:9-25 (the dangers resulted in "a lot of distractions to deal with"), 490:14-491:3 ("he is distracted at this crossing").

[108] Tr. 481:1-6, 491:9-15 (crossing interfered with their ability to see a train coming).

[109] Footnote 13.

[110] Tr. 468:12-20, 1106:2-13.

[111] Tr. 468:25-469:3 (Respondent had no limitations as to what it did to make the area reasonably safe for its employees). In its closing argument, Respondent engaged in lengthy explanation of its FELA duty that applied in the "workplace setting" in this case. Tr. 1365:9-13.

have exercised its exclusive authority and control over the crossing either by not creating the additional dangers in the first place, by removing them before the collision, or by closing the crossing.[112]

Because of the excessive number of dangers at the crossing,, Mr. Joe Lydick,[113] that the crossing should have been closed before the collision.[114] The crossing was closed after the collision.[115]

IV. The Collision

Appellant stopped the section truck at the stop sign where Respondent placed it.[116] When he did, the section truck was parallel to the tracks and facing

[112] Tr. 469:4-6 (Respondent "could have decided where to put the stop sign), 1126:9-21 (could have put a sign up at the House Track informing employees that they could stop in the foul of it), 1126:20-25 (could have changed the rules to allow fouling the House Track after crossing it), 1135:9-17 (gap was fixed after the collision), 469:18-24 (Respondent did not need anyone's permission to close the crossing, "They could close it whenever they wanted to").
[113] App 130-135, Tr. 457:1-5 (Mr. Lydick's curriculum vitae).
[114] Tr. 461:13-18 ("It should have been close [sic]").
[115] Tr. 465:1-5, Townlian Tr. 78:14-79:06 [Supplemental Transcript] (Respondent made the decision to close the crossing), Townlian Tr. 17:01-18:05, 19:14-23:15, 79:10-80:09 [Supplemental Transcript]; App 136, Tr. 615:25-616:9 (photograph of closed crossing with "ROAD CLOSED" crossing barricades erected), Townlian Tr. 25:16-26:21 [Supplemental Transcript] (crossing barricades erected between the April 6, 2018, date of the collision and the April 27, 2018, date of the photograph taken of them).
[116] Tr. 637:12-17, 1118:2-6, 1123:17-19.

north.[117] Facing north at the stop sign, Appellant could not see down the tracks to the south behind and to the right of the section truck.[118]

Appellant then pulled away from the stop sign and drove north toward the House Track and crossed it.[119] Pursuant to Respondent's rules, Appellant approached and crossed the House Track at as much of a right angle as possible, but there was insufficient room between the House Track and the west edge of the driving surface for him to approach and cross the House Track at a right angle.[120]

When he crossed the House Track, Appellant complied with Respondent's rule that prohibited him from stopping in the foul of it. Because there was insufficient room for him to stop at Main 2 without fouling the House Track, Appellant did not stop at Main 2.[121]

At this point, because of the rule, the distance between the tracks, and the distance between the tracks and the highway, Appellant kept driving as he crossed the tracks and prepared to merge into traffic at the highway.[122] As he operated the section truck over the crossing, he was alert and attentive.[123] Video of Appellant

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[117] Footnote 82.
[118] Footnote 83.
[119] Tr. 413:12-17, 1123:17-23.
[120] Tr. 637:18-638:5; footnotes 84-89.
[121] Tr. 1128:7-14, Tr. 643:16-644:3.
[122] Tr. 638:13-639:7.
[123] Tr. 641:16-24 (Appellant was alert and attentive and did the best he could under the circumstances of the crossing).

and the crew inside the section truck shows Appellant looking left, forward, and to the right.[124,125] Left was to the north in the direction of the potential of southbound train traffic and the southbound highway traffic that Appellant had to merge into.[126] Forward was east in the direction of the gap in the crossing planks that he had to maneuver the section truck around.[127] Right was to the south in the direction of the

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[124] Appellant's Trial Exhibit 18 and Respondent's Trial Exhibit 714 are the inward facing cab video admitted and played at trial. Tr. 414:24-415:4, 1029:9-15. Moreover, Respondent prepared demonstrative exhibits of screenshots from the video at intervals: -8.00, -7.00, -6.00, -5.00, -4.75, -4.50, -4.25, -4.00, -3.00, -2.00, and -1.00, which were admitted without objection and utilized with the Jury. Tr. 1324:17-1325:13. Those exhibits will be deposited with the Court pursuant to Rule 81.16(d).

[125] For the Trial Court's convenience at the post-trial motion hearing, and for this Court's convenience in the Appendix, Appellant prepared an annotated version of four (4) screenshots from the video admitted at trial. App 123, Tr. 1471:10-1475:14 is Exhibit No. 2 from the post-trial hearing. It consists of a set of four (4) screen shots from the inward facing section truck cab video taken as the section truck approached the crossing. The screen shots show Appellant looking left, forward, and right before Mr. McCourt warned Appellant of the oncoming train. App 124-126, Tr. 414:24-415:4 (video at time stamps -7.25, -6.25, and -4.00 shows Appellant looking left, forward, and right before the collision).

[126] *See* App 114, Tr. 1113:15-24 (crossing runs west to east such that a driver's left would be to the north when crossing to the east), footnote 52 (Appellant had to be concerned about train traffic on all tracks from all directions including from the north), 481:1-6 (Appellant had to be concerned about merging into highway traffic), 639:24-640:8 ("It was really early in the morning, everybody was coming and going out, there's people getting off work, going into work, it's a busy highway).

[127] Tr. 413:12-17 (the section truck drove east across the crossing), 401:24-402:4, 486:10-15, 489:9-25 (gap was a danger in the path of the section truck as it crossed the crossing).

potential, northbound train traffic, including the oncoming train.[128] There was no evidence or argument that Appellant gave attention to anything he was not required to.

Appellant looked right just before Mr. McCourt shouted the warning.[129] Mr. McCourt then said "go,"[130] and Appellant immediately "Got on the gas pedal as fast as he could."[131]

V. <u>Failure of Co-Workers to be Alert and Attentive and to Warn Appellant</u>

Respondent's rules required co-employee passengers to assist drivers in looking out for dangers and to warn drivers when they saw dangers.[132] After the collision, Roadmaster Feighner and his supervisor, Division Engineer Nicholas Norman, investigated the co-workers' conduct. Through Roadmaster Feighner and Division Engineer Norman, Respondent made admissions against interest that each of the three (3) co-workers in the section truck was responsible to keep a lookout

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[128] Tr. 414:12-18, 417:11-16 (south was to Appellant's right); 419:3-15 (when Appellant looked right, to the south, it was before Mr. McCourt had shouted the warning).
[129] Tr. 418:21-420:15.
[130] Tr. 420:7-15.
[131] Tr. 420:14-24.
[132] App 110, Tr. 422:13-22 (Maintenance of Way Operating Rule 1.1.2, employees must be alert and attentive for the safety of oneself and for the safety of others); App 122, Tr. 603:7-15 (Maintenance of Way Operating Rule 1.20, employees must be alert and attentive for train movement); Tr. 405:10-21, 431:2-8, 538:14-24, 610:3-8, 615:16-18, 640:16-23 (co-workers in section truck required to be alert for dangers that could affect the safety of the section truck), Tr. 640:16-641:13 (co-workers required to warn the driver of dangers).

for dangers to the section truck and to warn the driver of them. Roadmaster Feighner and Division Engineer Norman made admissions that the co-workers failed to perform these duties, and that their failure caused the collision.[133]

There was no evidence that Roadmaster Feighner and Division Engineer Norman investigated Respondent's responsibility for the placement of the stop sign, the proximity of the west edge of the driving surface to the House Track, the acute angle of the approach from the stop sign to the House Track, the impossibility of squaring up to the House Track, the proximity of the House Track to Main 2, the proximity of Main 1 to the highway, the rule that required a driver to keep driving once he crossed the House Track, the gap in the crossing planks, the failure of Respondent to provide the crew job safety briefings, or anything other than the crew's conduct.

Respondent presented no evidence to show that any of the conditions it created at the crossing were reasonably necessary or reasonably safe. Respondent presented no evidence to show that the demands made upon a driver's attention at the crossing were reasonably necessary or reasonably safe.

Appellant testified that the co-workers should have kept a lookout for the train,[134] but he felt that the dangers at the crossing put them in the same situation

[133] Tr. 610:9-611:21, 612:18-25 (Mr. McCourt), 614:1-6, 614:15-20, 615:8-10, (Mr. Gilkerson), 603:16-25, 605:15-24 (Mr. Saunders).
[134] Tr. 640:16-23.

he was in and that this situation was the reason his co-workers did not see the train and warn him until it was too late.[135]

VI. Injury and Damages

Prior to the collision, Appellant was fully physically and medically qualified for his railroad job without restrictions.[136] In the collision Appellant was violently thrown around the cab of the section truck. [137] As a result, he suffered new injury and aggravation of a pre-existing back condition that resulted in chronic pain and disability.[138]

Appellant was referred to a specialist, Dr. Hamilton, who implanted a permanent spinal cord stimulator[139] that provided limited relief.[140]

Dr. Patrick Griffith, a pain management physician, has performed two neural ablation procedures[141] that have provided limited symptom relief such that Appellant anticipates he will continue to undergo neural ablation procedures for the rest of his life.[142]

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[135] Tr. 713:12-716:6.
[136] Tr. 635:2-7
[137] Tr. 651:9-14
[138] Tr. 738:10-14
[139] Tr. 652:24-653:2
[140] Tr. 654:16-655:5
[141] Tr. 653:21-654:8
[142] Tr. 656:24-657:4

Jack Greene, Appellant's vocational rehabilitation expert, relied upon the testimony of Dr. Hamilton and Dr. Griffith that established Appellant's physical limitations.[143] Mr. Greene's opinions that Appellant is totally vocationally disabled and "not competitively employable" were given with a reasonable degree of professional certainty in his field.[144] Defendant presented no expert vocational witness at trial to dispute Mr. Greene's opinions.

Appellant testified that but for the collision he would have been able to continue working until age 67 utilizing his seniority for position selection.[145] Appellant retained an expert economist, Dr. Stan Smith, to assist in calculating the economic losses he had sustained to the date of trial and will sustain into the future due to his injuries.[146] Dr. Smith calculated four categories of damages: lost wages and employee benefits, lost pension benefits, lost household and family services, and lost services with respect to the rental properties.[147] Dr. Smith's opinion is that, if Appellant would have worked to age 67 on the railroad, Appellant's total economic damages are $2,126,767.00. Defendant presented no expert economics witness at trial to dispute Dr. Smith's opinions.

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[143] Tr. 760:25-761:6
[144] Tr. 774:11-13; 776:10-17
[145] Tr. 636:16-637:3
[146] Tr. 816:14-18
[147] Tr. 816:19-817:10

In its Verdict the jury found the total amount of Appellant's damages disregarding any fault on the part of Appellant to be $3,000,000.00.[148] Respondent has not contended that the damages evaluation is against the weight of the evidence.

VII. Appellant's Post-Verdict Motions

The Court entered judgment on October 28, 2024.[149] On November 27, 2024, Appellant filed Plaintiff's Motion to Amend or Modify Judgment to Apply the New or Additional Danger Requirement of the FELA Contributory Negligence Defense. [150] In this motion, Appellant asserted that Respondent's contributory negligence defense was an improper assumption of risk defense that operated to delegate Respondent's FELA duty to Appellant. In his motion, Appellant requested the Trial Court to set aside the Jury's contributory negligence apportionment and to enter judgment for the full amount of the verdict.

On February 20, 2025, the Trial Court overruled Appellant's motion[151] and entered its Amended Entry of Judgment applying the Jury's seventy percent (70%) contributory negligence apportionment and reducing Appellant's recovery in that proportion.[152]

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[148] D28 p. 1; App 105
[149] D34 pp. 1-3; App 1-3
[150] D37 pp. 1-19.
[151] D43 p.1; App 4
[152] D45 pp. 1-3: App 5-7

POINT RELIED ON

The Trial Court erred in submitting Respondent's contributory negligence defense to the Jury because it was an impermissible assumption of risk defense in violation of 45 U.S.C. §§ 51, 54, and 55 in that it made Appellant liable for the danger Respondent negligently put in Appellant's workplace and there was no substantial evidence that Appellant created a danger that was new or additional to the danger Respondent created.

45 U.S.C. § 54
45 U.S.C. § 55
Taylor v. Burlington N. R.R., 787 F.2d 1309, 1316 (9th Cir. 1986)
Birchem v. Burlington N. R. Co., 812 F.2d 1047, 1049 (8th Cir. 1987)

ARGUMENT

The Trial Court erred in submitting Respondent's contributory negligence defense to the Jury because it was an impermissible assumption of risk defense in violation of 45 U.S.C. §§ 51, 54, and 55 in that it made Appellant liable for the danger Respondent negligently put in Appellant's workplace and there was no substantial evidence that Appellant created a danger that was new or additional to the danger Respondent created.

I. Preservation of Error for Appellate Review

The question before the Court is whether the trial court committed prejudicial legal error in submitting Instruction No. 10 to the Jury. This instruction was proposed by Respondent to enable the Jury to consider and decide Respondent's contributory negligence defense and to apportion contributory negligence to Appellant.

Pursuant to Mo. R. Civ. P. 70.03, at the jury instruction conference Appellant timely objected to Instruction No. 10.[153] Appellant stated as grounds the same grounds that are the basis for this appeal: Respondent did not present any evidence that Appellant created any new or additional danger to the danger Respondent created.[154] Therefore, what Respondent was labeling a FELA contributory

[153] Tr. 1301:4-1302:5; Tr. 1490:24-1491:18.
[154] *Id.*

negligence defense was in fact a prohibited assumption of risk defense delegating Respondent's non-delegable duty to Appellant.

The objection was overruled, and Instruction No. 10 was submitted to the Jury.[155]

Applying Instruction 10 the Jury found Appellant's total damages to be $3,000,000.00 and apportioned seventy percent (70%) contributory negligence to Appellant.

The Trial Court thereafter entered judgment in Appellant's favor, reduced the Jury's finding of $3,000,000.00 in damages by the seventy percent (70%) contributory negligence the Jury apportioned to Appellant, and entered judgment for a net damages award of $900,000.00.[156]

Appellant timely filed a Mo. R. Civ. P. 78.07 motion specifically referencing the error in submitting Instruction No. 10: "The Court allowed Defendant to submit a contributory negligence theory that was supported by no proof that Plaintiff created a new or additional danger to the danger created by Defendant's negligence. This was reversable error."[157]

[155] Tr. 1302:3-7
[156] D45 p.1-3; App 5-7
[157] D37 p.15

The trial court denied Appellant's Mo. R. Civ. P. 78.07 motion and entered its Amended Judgment[158] in Appellant's favor in the amount of $900,000.00 after reducing the total amount of Appellant's damages awarded by the Jury for the seventy percent (70%) contributory negligence apportioned by the Jury.[159] This appeal timely followed.[160]

II. Standard of Review

Appellant appeals the Trial Court's submission of Instruction No. 10 to the jury. Appellant appeals the submission of this jury instruction on the grounds that Respondent's defense and the evidence in support of it were directed to and proved assumption of risk, not FELA contributory negligence. Respondent did not present any evidence relevant to FELA contributory negligence.

Whether the evidence supports a jury instruction upon a claim or defense is a preliminary question that a trial court decides as a matter of law. *Fairbanks v. Chambers,* 665 S.W.2d 33, 40 (Mo. App. W.D. 1984) ("But before defendant's liability on any theory could be submitted to the jury the preliminary question of defendant's exposure to that liability had to be decided by the trial court as a matter of law… The plaintiffs failed to show an improper purpose in defendant's use of

[158] The Judgment was amended to include an entitlement to post-judgment interest. D45 p.1-3; App 5-7
[159] D45 pp.1-3; App 5-7
[160] D46 pp. 1-4

their corporation necessary to justify piercing of the corporate veil. Clearly, the plaintiffs proceeded upon a theory not supported by the evidence"); *State v. Belcher,* 37 S.W. 800 (Mo., Div. Two 1986) ("The recent possession of stolen property raises a presumption of guilt but what constitutes recent possession which will justify this instruction is a preliminary question for the court").

Whether a jury was properly instructed is reviewed de novo on appeal. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. banc 2010) "Any issue submitted to the jury in an instruction must be supported by substantial evidence from which the jury could reasonably find such issue. Substantial evidence is evidence which, if true, is probative of the issue and from which the jury can decide the case. If the instruction is not supported by substantial evidence, there is instructional error, which warrants reversal only if the error resulted in prejudice that materially affects the merits of the action." *Id*. (citations and internal quotation marks omitted).

Because the Jury relied on the erroneous instruction to assess a percentage of contributory negligence to Appellant which reduced his total damages by that percentage, the improper submission was prejudicial. *Hayes,* 313 S.W.3d at 652 ("The improper submission is prejudicial because Mr. Hayes was assessed a percentage of fault and his damages were reduced by that percentage"); *Rider v. YMCA of Greater Kansas City*, 460 S.W.3d 378, 385 (Mo. App. 2015).

III. Jury Instruction Erroneously Given

Pursuant to Rule 84.04 (e), the following is the subject Instruction No. 10:

INSTRUCTION NO. 10

In your verdict, you must assess a percentage of fault to plaintiff if you believe:

First, plaintiff failed to keep a lookout for and yield to the oncoming trains, and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff resulted in whole or in part in injury to plaintiff.

(D27 p. 13).

IV. Argument Presented

The question before the Court is whether Respondent's contributory negligence defense required Appellant to assume the risk of the dangers Respondent negligently placed in Appellant's workplace. If it did, the defense violated the provisions of 45 U.S.C. § 51 that hold Respondent exclusively responsible for injury caused by the dangers it places in employee workplaces. It violated 45 U.S.C. § 54 that abrogates the assumption of risk defense in FELA cases, and it violated 45 U.S.C. § 55 that prohibits application of any "device whatsoever… which shall enable any common carrier to exempt itself from any liability created by this act."

To answer this question, it is necessary to identify 1) the danger Respondent negligently placed in Appellant's workplace and 2) the danger Respondent's

defense sought to hold Appellant responsible for removing or avoiding. If the danger is the same, then the defense sought for Appellant to assume the risks of the danger Respondent negligently created, and it is a prohibited assumption of risk defense. If the danger Respondent sought to hold Appellant responsible for is one Appellant created and that is new or additional to the one Respondent created, then the defense is an appropriate contributory negligence defense.

A. The Non-Delegable Nature of the 45 U.S.C. § 51 Duty and its Purpose in the Design of the FELA

The purpose of 45 U.S.C. §§ 51, *et sequitur* (the FELA) is to remedy employee injuries and deaths negligently caused by railroad negligence. To do this, Congress examined the special exigencies of the railroad industry and tailored the relative responsibilities of the railroad and its employees to fit those special exigencies.

> This statute, an avowed departure from the rules of the common law, cf. *Rogers* v. *Missouri Pacific R. Co*., 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller* v. *Atlantic Coast Line R. Co*., 318 U.S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan* v. *American Dredging Co*., 355 U.S. 426, 431, 438. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 3.

Sinkler v. Mo. Pac. R. Co., 356 U.S. 326, 329-330 (1958)

Under the FELA, the railroad has a non-delegable duty to provide its employees a reasonably safe place to work. By operation of specific statutes such as 45 U.S.C. §§ 51, 54, and 55, and by the interpretation and application of these laws in United States Supreme Court authority, the FELA ensures that railroads will not be allowed to delegate their responsibility for workplace safety to anyone, including and especially to the very employees the law is designed to protect.[161] *Sinkler, supra*; *Payne v. Baltimore & O. R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962) ("If the jury found liability by virtue of defendant's independent negligence in sending the boxcar on a track having a dangerous condition present which could have been foreseen, the verdict is sound. If it found liability by virtue of imputing the negligence of SUCO to defendant, based on defendant's nondelegable duty regarding safety for its employees, the verdict is sound. Regardless of the rights between themselves, of defendant and of SUCO, defendant may not legally delegate to another its duty to its employee, and thereby escape liability to such employee. This is the basis for the FELA."); *Birchem v. Burlington N. R. Co*., 812 F.2d 1047, 1049 (8th Cir. 1987) (distinguishing between duty to provide a reasonably safe place to work and duty to work reasonably safely in the workplace provided, "The Railroad believes that Birchem's violation of safety rules is

[161] App 8 (45 U.S.C. § 51), App 9 (45 U.S.C. § 54), and App 10 (45 U.S.C. § 55).

sufficient evidence to establish his negligence and make it a jury question. The district court properly admonished the jury during the trial that the Railroad's theory was an impermissible effort to transfer to Birchem its nondelegable duty to provide safe equipment and a safe working environment"); *Pepin v. Wis. Cent. Ltd*., 2021 U.S. Dist. LEXIS 171788*, 11*-12* (D.C. W.D. Mich., Northern Div. 2021) ("WCL cannot avoid liability under the FELA by delegating to its employees the responsibility to avoid unsafe conditions created by WCL"); *Nectaux v. Kansas City S. R. Co.*, 18 F.2d 681 (D.C. W.D. La., Shreveport Div. 1926) ("I cannot conceive that an employer may thus shift responsibility for its duty to its employees to see that its tracks are kept open for the movement of trains upon which they are employed"); *St. Louis-San Francisco Ry. Co. v. King*, 368 P.2d 835, 842 (Okla. 1961) ("Defendant's Requested Instruction No. 12 would have told the jury, in substance, that, where an employee is free to follow the method he chooses in performing a task, he assumes the risk of being injured in using that chosen method. Such an instruction was not applicable to this case. It would have tended to mislead the jury into believing that an employer may delegate to the employee a duty that is a nondelegable one under the FELA").

In addition to its remedial purpose, the non-delegable nature of the FELA duty serves a deterrent effect. It deters railroads from negligently causing

employee injuries and deaths by ensuring that railroads know they will be legally responsible for them.

> Independent of the railroad's obligations under its CBA, the FELA provides railroad workers not only with substantive protection against negligent conduct by the railroad, but also affords an injured worker a remedy suited to his needs, untrammeled by many traditional defenses against tort liability. *Buell*, 480 U.S. at 565. This statute thus serves to provide an injured worker with an expeditious recovery and also gives a railroad the incentive to maintain vigilance over the safety of its workers and, concomitantly, the conditions in which they must work.

Kuvalic v. Chicago & Ill. M. Ry. Co., 1 F.3d 507, 512 (7th Cir. 1993).

This is simple you-break-it-you-pay-for-it deterrence. "Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. ***When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee***." *Payne*, 309 F.2d at 549 (emphasis added).

B. The Role of the Abrogation of Assumption of Risk in Protecting the Non-Delegable Nature of the 45 U.S.C. § 51 Duty

The assumption of risk defense is a form of delegation of the railroad's non-delegable duty to the employees themselves. Under the assumption of risk defense, the railroad delegates liability for injury or death caused by unsafe conditions in the workplace from itself to the employee who is injured or killed by them. The defense makes it the employee's responsibility to either make the workplace safe

himself, avoid the dangers the railroad creates there, be liable for those dangers, or decline to work there at all. *See generally Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1276-1280 (3rd Cir. 1995) (exhaustive, historical exploration of different articulations of the defense). Because it is a form of delegation of the nondelegable duty the railroad owes its employees, the assumption of risk defense is abolished under the FELA. 45 U.S.C. § 54.

Under the FELA, employees do not assume the risks of their employment, including the risks of open and obvious dangers. 45 U.S.C. § 54 (no exception for open and obvious dangers);*Cazad v. Chesapeake & O. R. Co*., 622 F.2d 72, 75 (4th Cir. 1980) (comparing state law liability for open and obvious dangers to that of the FELA, "C&O's liability under the FELA, however is a different matter, for it had the nondelegable duty to provide Cazad and its other employees with a safe place to work even when their duties required them to go onto property owned by a third party… although the danger was not hidden from the plaintiff, there was, as noted by the district court, sufficient evidence to support the conclusion that Cazad was distracted by the performance of his work when he fell into the culvert. In going about his duties, Cazad had a right to assume that C&O had taken reasonable precautions to eliminate potential hazards from the work site.") Whereas in a comparative fault system such as Missouri's a person assumes the risk of an open

and obvious danger, this is not the case for an employee under the FELA. *Coomer v. Kan. City Royals Baseball Corp*., 437 S.W.3d 184, 192-193 (Mo. 2014).

Under the FELA, the distinction relevant to assumption of risk is not whether the danger was open and obvious. The distinction is whether the danger was new or additional to the one created by the railroad. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986) *Birchem, supra*, 812 F.2d at 1049; *Fashauer, supra*, 57 F.3d at 1275.

C. The Role of the New or Additional Danger Test in Identifying Assumption of Risk Defenses

In order to assist courts in this work, the authorities have developed a test for detecting assumption of risk defenses. The test discerns whether the defense would delegate liability for the danger the railroad created away from the railroad (where §51 requires it to be and remain) to the employee (where §54 would prohibit the delegation). This is the New or Additional Danger Test. *Taylor, supra*, 787 F.2d at 1316; *Birchem, supra*, 812 F.2d at 1049; *Fashauer, supra*, 57 F.3d at 1275.

Under the New or Additional Danger Test, the court looks to whether the defense alleges that the employee was injured by the danger the railroad created, or whether the defense alleges that the employee was injured by a new or additional danger that the employee created. If the defense alleges that the employee was injured by the danger the railroad created, then it is a defense that the employee

should assume responsibility for a danger that the railroad created, and it is a prohibited assumption of risk defense. If, on the other hand, the defense alleges that the employee was injured by a new or additional danger that the employee himself created, then the defense does not attempt to shift to the employee responsibility for the danger the railroad created. It attempts only to hold the employee responsible for the danger he created, and it is not an assumption of risk defense.

There is no dispute in this appeal that Respondent's 45 U.S.C. § 51 duty is non-delegable, that the assumption of risk defense is abolished in FELA cases, and that the New or Additional Danger Test is applied to determine whether a defense is a prohibited assumption of risk defense. At page 9 of Defendant BNSF Railway Company's Response in Opposition to Plaintiff's Motion to Amend the Judgment Related to the Issue of Contributory Negligence, Respondent affirmatively asserted that, "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."[162]

[162] D41 p. 9. To be precise, Respondent ends the statement with quotation marks, without corresponding beginning quotation marks, and cites it to "*Id.*" wherein the previous citation was "*Miller v. Norfolk Southern Railway Company,* 591 S.W.3d29, 42 (Mo. App. 2019) (citing *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269, 1277 (3d Cir. 1995)." The statement is found in *Fashauer*, 57 F.3d at 1275, where the opinion quotes it from *Taylor,* 787 F.2d at

D. Application of the New or Additional Danger Test in this Case

1. Comparison of the Negligence and Contributory Negligence Dangers Alleged

Appellant's theories of liability were that the conditions at the crossing were not reasonably safe, the work methods Respondent employed at the crossing were not reasonably safe, and the co-workers Respondent provided Appellant to assist in his work at the crossing failed to provide him reasonably adequate help.[163] Appellant claimed that these were dangers Respondent negligently put in Appellant's workplace, resulting in Appellant being required to give attention to more dangers than he reasonably could give adequate attention. The danger was that Appellant would be unable to give adequate attention to one of the dangers, and that danger would injure him. ***The danger Appellant was unable to give adequate attention to was the possibility of train traffic coming from the south*** on one of the three (3) railroad tracks at the crossing, and the result was that a train coming from that direction on one of those tracks collided with the section truck Appellant was driving.

The Jury found in favor of Appellant on the question of Respondent's negligence.[164] While the verdict form did not require the Jury to identify the

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1316 (9th Cir. 1986). At page 10 of Respondent's response, Respondent restates the legal principle and cites it to *Fashauer* and *Fashauer's* citation to *Taylor*.

[163] D27 p. 11; (Appellant's negligence verdict director, Instruction No. 8).

[164] D28 p.1; App 105 (Verdict).

negligence theories for which it found in favor of Appellant, each presented the same danger: that Respondent placed too many dangers at the crossing for Appellant to give adequate attention to all of them, making it reasonably likely that one of the dangers would receive inadequate attention and that Appellant would be injured by it.

Respondent's defense was that ***Appellant was contributorily negligent because he failed to give adequate attention to the possibility of train traffic coming from the south*** on the track the striking train was on.[165] As a result, Appellant failed to see and yield to the train, and the train collided with the section truck Appellant was driving.[166]

Appellant's negligence theory and Respondent's contributory negligence theory both were premised on the same danger: ***inadequate attention to the possibility of train traffic coming from the south***. Therefore, Respondent's contributory negligence defense is an impermissible assumption of risk defense that would delegate Respondent's responsibility for the dangers it placed in Appellant's workplace to Appellant to remove or avoid them.

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[165] D27 p.13; App 104 (Respondent's contributory negligence verdict director, Instruction No. 10).

[166] Noting that one cannot fail to yield without first failing to see the train. Tr. 545:15-546:15.

2. Respondent's Position on the New or Additional Danger Test

Under Appellant's negligence theory, Respondent's placement of so many dangers in Appellant's workplace caused Appellant's failure to see the train coming from the south. Under Respondent's contributory negligence theory, it does not matter why Appellant failed to see the oncoming train. According to Respondent, its negligence in placing the dangers in Appellant's workplace should be ignored and only Appellant's failure to remove or avoid them should be considered. In this way Respondent ignores, and Respondent would have the Court ignore, Respondent's side of the New or Additional Danger Test.[167]

The record answers the question. Respondent presented no evidence or argument that Appellant created any new or additional danger that injured him. Respondent's contributory negligence theory was that Appellant was injured by the

[167] App 137-140 is Exhibit Nos. 10-13 from the hearing upon Plaintiff's Motion to Amend or Modify Judgment to Apply the New or Additional Danger Requirement of the FELA Contributory Negligence Defense. D37 pp. 1-19 (motion); Tr. 1485:18-1490:5 (post-trial hearing transcript, discussion of Exhibits 10-13). The exhibits presented the questions that were before the Trial Court and that are now before this Court. Exhibit No. 11 presents the question in context of the crossing conditions and methods negligence theories, and Exhibit No. 13 presents them in context of the co-worker liability theory. After providing his answers to these questions on corresponding exhibits No. 10 and 12 directed to Appellant (*Id.*), Appellant respectfully requested Respondent to do the same and simply state and write down its answers to the questions so everyone involved could see them and understand them. Respondent declined. Without Respondent's answers to these questions, the Trial Court did not identify or refer to any such answers to these questions in its order overruling Appellant's motion (D43 p.1; App 4) or its Amended Entry of Judgment (D45 pp. 1-3; App 5-7).

same danger Appellant claimed was caused by Respondent's negligence, but that it was Appellant's duty to remove or avoid that danger.

Respondent did not deny that it placed the stop sign for the crossing two hundred (200) feet away from the crossing facing south where the section truck was required to stop and face north in a position where Appellant could not see oncoming train traffic from the south. Respondent did not deny that there was inadequate room in between the House Track and the west edge of the driving surface for Appellant to approach and cross the House Track at a right angle "to allow for optimal viewing of potential approaching movements."[168] Respondent did not deny that its rule and the proximity of the House Track prevented Appellant from stopping at Main 2, and Respondent did not deny that the rule and the proximity of Main 1 to the highway prevented Appellant from stopping at the highway before merging into highway traffic. Respondent did not deny that, if its rule were followed,[169] once Appellant crossed the House Track he was required to

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[168] Footnote 84.

[169] Respondent did not contend that the rule did not exist or that it was not in effect at the time of the collision. Respondent conceded the fact of the rule and its applicability at the crossing. In fact, Respondent was emphatic about it. "(F)or anybody to be watching this trial and try to contend that it is theory of our defense of the case, that rule 12.1.2 does not apply, is really not paying attention to the evidence and our argument, because that is absolutely false." Tr. 1286:18-22. Respondent elicited testimony that it was permissible to violate the rule at this crossing. Tr. 910:18-911:3, 911:22-25. Respondent elicited testimony that on its railroad, sometimes an employee has to violate its safety rules to make themselves safe. Tr. 452:9-14 ("Q. Are there situations where the rules don't quite jive? If you

keep driving through the merger onto the highway traffic. Nor did Respondent deny the fact of the gap in the crossing planks.

Respondent did not deny that each of the dangers at the crossing required Appellant's attention as he drove the section truck across it. Respondent did not deny that Appellant was giving his attention to the dangers at the crossing as he drove the section truck across it. Respondent put on no evidence that Appellant, at any time, gave any attention to anything other than the dangers as he drove the section truck across the crossing.

Respondent did not deny that the eight (8) seconds of video of Appellant inside the section truck before the time of impact show Appellant alert and attentive and looking to the north (his left) in the direction of possible train and highway traffic coming from that direction, to the east (forward in front of him) in

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were to put them together for a particular situation where you would say, well you've got to do this but you are going to break that, you know, it doesn't quite work black and white according to the rules? Does that ever happen? A. Yes, it does"). This was not a method of railroad operation the Federal Railroad Administration Railroad Safety Oversight Manager, Mr. Lydick, had ever heard of. Tr. 493:1-10 ("I've never heard that before"). Nor had Appellant. Appellant testified that he would have been fired if he were caught violating this rule at the crossing. Tr. 642:11-643:15. If Respondent did, in fact, expect its employees to violate the rule at the crossing, this should have been the subject of job safety briefings that Respondent did not provide Appellant or the crew. App 108-109, Tr. 491:16-492:17 (Maintenance of Way Safety Rule S-1.1), 539:3-9 (complete set of Maintenance of Way Safety Rules admitted into evidence); App 110, Tr. 422:13-423:24 (Maintenance of Way Operating Rule 1.1, discussed in context of Maintenance of Way Operating Rule 1.1.2); App 111-112, Tr. 956:15-957:23. (Maintenance of Way Operating Rule 11.4).

the direction of the gap and the highway apron, and to the south (his right) the direction of possible train and highway traffic coming from the south and highway vehicle lights that could blend with the train lights.[170] Respondent did not deny that before Mr. McCourt shouted the warning to Appellant, Appellant himself also looked to the south (his right) in the direction of the oncoming train.[171] In fact, in closing argument, Respondent suggested that at the time of the collision Appellant either was paying attention to the oncoming train or to highway traffic coming from the south.[172]

Respondent did not deny that as soon as Mr. McCourt made Appellant aware of the train, Appellant acted immediately and that his immediate reaction saved the lives of Mr. McCourt, the other co-workers, and himself.[173]

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[170] Footnotes 126, 127, and 128.

[171] The fact is undeniable because it is captured on video. *See* footnote 124.

[172] Respondent told the Jury that when "the train is in sight, clearly within a few hundred feet, and with each click, it's getting closer and Mr. Inglis makes the viewing to the right, in the end." Tr. 1373:3-13. Respondent then suggests that when Appellant looked to his right in the direction of the oncoming train he either was "looking at the road traffic, or harder to the right, like Mr. McCourt, I don't know, you can judge that…" *Id.* Respondent therefore concedes that at the time of the collision Appellant was looking either at the danger of highway traffic, the highway lights that could be confused with the lights of the train, or the train itself, but either way he was looking at things he was supposed to be looking for as he crossed the crossing.

[173] In this context, Respondent elicited testimony from Mr. McCourt that his warning to Respondent, albeit too late to avoid the collision, also saved the life of the co-workers and Appellant. Tr. 434:5-7. What Mr. McCourt's warning and Appellant's response to it showed was the importance of Respondent's rule

At trial, Respondent did not endeavor to prove that Appellant created a danger that was new or additional to the one Respondent created. Respondent's defense was that the fact that it created the danger was irrelevant to its contributory negligence defense. According to Respondent, the only fact relevant to its contributory negligence defense was that Appellant did not successfully remove or avoid the danger Respondent created, and therefore, he should assume the risk and liability for the injury that danger caused.

3. The Record Dispositive of the Question Before the Court

Dispositive of the question before the Court is the fact that Respondent presented no evidence or argument that Appellant committed any act or omission that created a new or additional danger to the danger Respondent negligently created. The danger Respondent negligently created by placing so many dangers in Appellant's workplace was that Appellant would ***fail to give adequate attention to one of them and that it would injure him as a result***. This was the same danger Respondent alleged in its contributory negligence defense: Appellant ***failed to give adequate attention to one of the dangers at the crossing and it injured him as a result***.

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requiring co-workers to be alert and attentive for dangers to the section truck and to warn the driver of them when they see them.

Because Respondent's defense neither alleged, attempted to prove, nor proved that Appellant created danger new or additional to the ones Respondent negligently created in Appellant's workplace, the defense required Appellant to assume the risks of the dangers Respondent created. It did not hold Appellant responsible for new or additional dangers Appellant created. Therefore, the defense impermissibly delegated to Appellant Respondent's liability for the dangers Respondent placed in Appellant's workplace in violation of 45 U.S.C. § 51. It was a defense prohibited by the abrogation of assumption of risk in 45 U.S.C. § 54, and it was a defense that operated as a "device whatsoever… which shall enable any common carrier to exempt itself from any liability created by this act" in violation of 45 U.S.C. § 55.

CONCLUSION

This is a simple case in which Respondent's contributory negligence defense was that Appellant should have removed or avoided the danger Respondent put in his workplace. It is not a case in which Respondent's contributory negligence defense was that Appellant was injured by a new or additional danger Appellant created. Therefore, Respondent's contributory negligence defense was an impermissible assumption of risk defense that improperly held Appellant responsible for injury caused by the danger Respondent put in its employee's workplace. The Jury's contributory negligence finding upon that defense was an impermissible assumption of risk finding that should be set aside, and judgment should be entered for the full damages the Jury found. This is an appeal that may be resolved this simply. *See e.g., Perez v. Florida East Coast Railway Co.,* 673 So.2d 62 (Fla. App. 3rd Dist. 1996).

WHEREFORE, upon the foregoing arguments and authorities, Appellant respectfully requests the Court to reverse the Trial Court's February 20, 2025, Amended Entry of Judgment and remand the case with instructions for the Trial Court to strike the improper apportionment of contributory negligence and enter judgment for Appellant in the full amount of the verdict.

Respectfully submitted,

_/s/ *Phillip G. Greenfield*_____
Christopher H. Leach, MO Bar No. 34147
Hubbell Law Firm, LLC
1100 Main Street, Suite 2323
Kansas City, MO 64105
Telephone: (816) 221-5666
Facsimile: (816) 221-5259
Email: cleach@hubbellfirm.com

AND

Phillip G. Greenfield, MO#37457
GM Law PC
1201 Walnut Street, 20th Floor
Kansas City, MO 64106
Telephone: 816 471-7700
Fax: 816-471-2221
E-mail: philg@gmlawpc.com

AND

Nicholas Hinrichs, MO Bar No. 63506
Hinrichs & Scott Law Firm, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
Telephone: (816) 320-4454
Facsimile: (816) 817-8897
Email: nick@hsinjuryfirm.com

Attorneys for Appellant

CERTIFICATION REQUIRED BY RULE 84.06(C) & LOCAL RULE 41 (A) & (D)

Pursuant to Rule 84.06 (c) and Local Rule 41(A) & (D), undersigned counsel for Appellant herewith certifies that this brief complies with the limitations contained in Rule 84.06(b) and Local Rule 41(A) & (D) in that the number of words contained in this brief, excluding the cover, Table of Contents, Table of Authorities, any certificate required by Rule 84.06(C) and Local Rule 41(A) & (D), signature block, and appendix, is 11,895, as counted by the word-processing system used to prepare the brief, Microsoft Word, which is less than the maximum amount of 15,500 words for Appellant's initial brief.

Respectfully submitted,

_/s/ *Phillip G. Greenfield*
Christopher H. Leach, MO Bar No. 34147
Hubbell Law Firm, LLC
1100 Main Street, Suite 2323
Kansas City, MO 64105
Telephone: (816) 221-5666
Facsimile: (816) 221-5259
Email: cleach@hubbellfirm.com

AND

Phillip G. Greenfield, MO#37457
GM Law PC
1201 Walnut Street, 20th Floor
Kansas City, MO 64106
Telephone: 816 471-7700
Fax: 816-471-2221
E-mail: philg@gmlawpc.com

AND

Nicholas Hinrichs, MO Bar No. 63506
Hinrichs & Scott Law Firm, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
Telephone: (816) 320-4454
Facsimile: (816) 817-8897
Email: nick@hsinjuryfirm.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to Rule 103.08, undersigned counsel for Appellant hereby certifies that on this 29th day of July 2025, I electronically filed the foregoing using the Missouri E-Filing System, which sent a notice of electronic filing to the following attorneys of record for Respondent BNSF Railway Company:

Scott R. Ast
Rachel Smith
Sean Hamer
SCHARNHORST AST KENNARD GRIFFIN, PC
1100 Walnut, Suite 1950
Kansas City, MO 64106-2197
Telephone: (816) 268-9400
Email: sast@sakg.com
rsmith@sakg.com
shamer@sakg.com

AND

Randy P. Scheer
BATY OTTO SCHEER P.C.
1855 S. Ingram Mill Road, Suite 207
Springfield, MO 65804
Telephone: (417) 281-5100
Email: rscheer@batyotto.com

ATTORNEYS FOR RESPONDENT

Respectfully submitted,

_/s/ *Phillip G. Greenfield*
Christopher H. Leach, MO Bar No. 34147
Hubbell Law Firm, LLC
1100 Main Street, Suite 2323
Kansas City, MO 64105
Telephone: (816) 221-5666

Facsimile: (816) 221-5259
Email: cleach@hubbellfirm.com

AND

Phillip G. Greenfield, MO#37457
GM Law PC
1201 Walnut Street, 20th Floor
Kansas City, MO 64106
Telephone: 816 471-7700
Fax: 816-471-2221
E-mail: philg@gmlawpc.com

AND

Nicholas Hinrichs, MO Bar No. 63506
Hinrichs & Scott Law Firm, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
Telephone: (816) 320-4454
Facsimile: (816) 817-8897
Email: nick@hsinjuryfirm.com

Attorneys for Appellant