SC92996

IN THE SUPREME COURT OF MISSOURI

RAFAEL LOZANO, PLAINTIFF-APPELLANT

vs.

BNSF RAILWAY COMPANY, DEFENDANT-RESPONDENT

On Appeal
From the Circuit Court of Jackson County, Missouri
16th Judicial Court
Honorable Jack R. Grate
Case No. 1016-CV05790

DEFENDANT-RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant Rafael Lozano was not injured by a flying end-of-train device ("ETD") that had become a projectile. Tr. 318.[1] Nor was he burned by a fire caused by an errant ETD. *Id*. Nor did Lozano trip over an ETD that someone had left on the floor of the locomotive cab. Instead, Lozano claims that he developed an inguinal hernia from the strain of lifting an ETD that someone (he did not say who) allegedly left behind the refrigerator[2] in the nose of an SD-40 diesel locomotive. *Id.*; Plaintiff's Original Petition at ¶ 8, LF 2. When Lozano's alleged injury occurred, the locomotive was not in motion but was sitting stationary in BNSF's Argentine Locomotive Maintenance and Inspection Terminal ("LMIT"), where Lozano worked as an electrician.

It was part of Lozano's job as an electrician, one type of locomotive mechanic, to see that the locomotive was lead-qualified, meaning that it was clean and safe for BNSF's train crews to operate. Tr. 249-50. To ensure that the locomotive was lead-qualified, Lozano ensured the functioning of the lights, heater, air conditioner, toilet, and radio, and made sure that the cab was clean and nothing was loose in the locomotive. Tr. 250. In essence, a function of his job was to remedy any potentially hazardous conditions with a

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[1] References to the Legal File in this brief will be shown as (LF ___). References to the Trial Transcript will be shown as (Tr ___). References to the Appendix to this Substitute Brief will be shown as (A ___).

[2] The small refrigerator was also commonly referred to at trial as a "water cooler." Tr. 156.

locomotive before the locomotive left the LMIT and went into use out on the line. *See* Tr. 249-50.[3] Lozano testified that it was within his duties as an electrician to remove any ETDs he found in a locomotive. *See id.*; Lozano's Substitute Brief at p. 30.

[3] 49 C.F.R. § 229.119(c) provides, "Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping, or fire hazard." 49 C.F.R. § 229.119(c). This regulation was promulgated by the Federal Railroad Administration ("FRA") pursuant to its rulemaking authority under the Locomotive Inspection Act, 49 U.S.C. § 20701 et seq. ("LIA"), which prohibits a railroad from using on its line a locomotive that is not safe to operate. Notably, the LIA and implementing regulations apply only to a locomotive that is "in use" on its railroad line. *Id.*; *see also Wright v. Arkansas & Missouri R.R. Co.*, 574 F.3d 612, 620 (8th Cir. 2009)(explaining the "in use" requirement). The purpose of the "in use" requirement is to allow a railroad the opportunity to remedy non-complying conditions before a locomotive is released for use on its line. *Id.* Thus, locomotives being serviced in a place of repair are not "in use" within the LIA. *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976 (8th Cir. 1983); *Angell v. Chesapeake and Ohio Railway Co.*, 618 F.2d 260, 262 (4th Cir.1980)(explaining that the LIA did not apply during the inspection, repair, or servicing of railroad equipment located at a maintenance facility). Thus, part of Lozano's job was to rectify any non-complying conditions before the locomotive left the repair facility and went onto BNSF's line.

Lozano admitted that he had lifted end-of-train devices many times before without incident. *See* Tr. 350-351. By his estimate, he had removed ETDs from locomotive cabs as many as 1,800 times without incident. *See id.* Lozano further testified that he had never experienced physical injuries from lifting an end-of-train device before that day, nor did he know of anyone else that had ever been injured while lifting or carrying an end-of-train device. *See id.* at 352. Lozano's own witness, Joe Bob O'Neal, likewise recalled having handled ETDs probably hundreds of times and admitted that he never hurt himself lifting or carrying them. In fact, O'Neal, like Lozano, was not aware of anyone else who had hurt himself handling an ETD.

Lozano himself was the only person who claims to have seen the ETDs behind the refrigerator. No evidence was presented regarding who placed them there or why, how long they had been in that location, or whether anyone else on the railroad was even aware of their presence behind the refrigerator. Lozano presented no evidence that he alerted anyone about the presence of the ETDs, that anyone at BNSF instructed him to remove the ETDs from the location where he found them, nor did he claim that he requested and was refused additional assistance in performing the task.

Lozano admits that he did not anticipate any risk, to himself or anyone else, in removing the end-of-train devices from the place where they were located. Tr. 352. He further admitted that, if he thought there was a risk, he would have reported it. *See id.* But in this case, he did not report it, "because [he] felt [he] could pull them out safely." *See id.* at 353. Lozano was not aware of any specific rule against having an ETD in a locomotive. *See id.*

Lozano testified that because of the location of the ETDs behind the refrigerator, he could not lift with his legs or lift close to his body but instead had to lean over the refrigerator and used it to brace himself as he lifted the ETDs, which he estimated weighed 40 pounds. Tr. 267-69. He also said that he was unable to comply with a specific railroad safety rule requiring him to use proper lifting techniques. Lozano said that as he was lifting and twisting an ETD, he felt pain in his groin. Tr. 267. Lozano presented opinion testimony from his treating surgeon, Dr. Brian McCroskey, that lifting the ETDs in the manner Lozano described could produce a hernia. Tr. at 33. Dr. McCroskey further expressed his opinion that Lozano's hernia was caused by his lifting the ETDs, since stretching out and lifting something heavy increases intra-abdominal pressure. Tr. 127-28.

Despite a railroad rule requiring the prompt reporting of all workplace injuries, Tr. 327, Lozano did not complete an injury report until June 22, 2007, or several weeks after his symptoms first arose. Tr. 339. In this injury report, which Lozano recognized was supposed to contain a complete and accurate account of his injury, Lozano made no mention of any ETD or even a discrete injury that caused his accident; instead, he classified his hernia injury as "cumulative." Tr. 343. The injury form also afforded Lozano the opportunity to "describe fully how occupational illness occurred." Tr. 343-44. Lozano left this portion of the form blank. *Id.* And although at trial Lozano was critical of the person who allegedly left the ETDs behind the refrigerator, Lozano answered "no" to the question in the injury report asking, "Was the accident caused by the conduct of another person?" Tr. 345.

The injury form also had a box that afforded Lozano the chance to indicate whether "there [was] anything wrong with the equipment, work procedures or work area which led to this accident/injury." Tr. 347. Lozano acknowledged that this was his opportunity to tell the railroad if there was something wrong, dangerous, or defective that caused his injury. *Id*. Although Lozano acknowledged at trial that he was blaming his injury on the ETDs behind the water cooler, he nevertheless admitted that he left this part of the injury form blank as well. *Id*.

The medical records associated with Lozano's treatment also made no mention of any incident involving an ETD, or even any work-related traumatic incident at all. Lozano first sought treatment from his primary care physician, Dr. Gutierrez, who diagnosed Lozano with an inguinal hernia and referred Lozano to a surgeon. The notes from Dr. Gutierrez's initial visit with Mr. Lozano made no mention of any incident involving an ETD or any other work-related incident. Ex. 13; Tr. 303. Lozano next consulted with surgeon Dr. McCroskey, who served as Lozano's expert witness at trial. Dr. McCroskey confirmed that Lozano never told him that he had injured himself lifting an ETD. Tr. 131. Dr. McCroskey likewise confirmed that his office notes contained no reference to an ETD, nor did they reflect that Lozano had attributed his onset of groin pain to any particular activity. Tr. 132.

It was not until roughly a year later that Lozano first told BNSF that he attributed his hernia to his lifting and carrying an ETD. Tr. 319. In his initial statement to a BNSF claims representative, Lozano claimed that there were actually two ETDs, one behind the refrigerator and one in the bathroom. Tr. 323-24. By the time of trial, however, Lozano

said that both ETDs were behind the refrigerator, with one higher than the other. Tr. 266. Lozano also could not remember many of the details surrounding the alleged ETD incident. Lozano was unable to identify the date when his injury occurred, saying only that it occurred in May 2007. *See* Tr. 333. He could not be more certain. He also never identified which locomotive he was allegedly injured on. *See* Tr. 348-50.

Lozano missed six weeks of work, or thirty-one workdays, following his hernia repair surgery. Tr. 353. That ended up equaling $5,850 in lost wages. *See id.* at 353-56. Lozano returned to work August 7, 2007 without restriction and worked up to the time of trial without missing any further days of work because of his hernia. Tr. 356-57.

The case proceeded to trial on August 8, 2011. On August 10, 2011, the jury returned a verdict in favor of BNSF, and the Honorable Judge Jack Grate entered a judgment to that effect on August 11, 2011. LF at 99-100. Lozano filed a Motion for New Trial on September 2, 2011 (LF 102-118) and a Revised Brief in Support of that Motion on October 5, 2011 (LF 167-185). On October 26, 2011, the trial court denied Lozano's Motion for New Trial. (LF 190).

Lozano then appealed to the Missouri Court of Appeals, Western District. LF 194. Lozano filed his Amended Brief with the Court of Appeals on May 16, 2012.[4] BNSF filed its Brief of Respondent on June 29, 2012. Counsel for the parties appeared before the Western District Court of Appeals and presented oral arguments. On October 9, 2012, the Western District entered an Order affirming the judgment of the trial court on

[4] *See* Appellant's Brief (A1-A58).

all counts.[5] The Court of Appeals also filed a Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b).[6]

On December 4, 2012, Lozano filed an Application for Transfer to the Missouri Supreme Court under Missouri Supreme Court Rule 83.04.[7] On February 26, 2013, this Court granted Plaintiff's Application for Transfer under Rule 83.04. This Court did not request a response to Lozano's Application for Transfer, so this Brief represents the first opportunity that BNSF has to address the claims Lozano asserted in that Application.

ARGUMENT

I. STANDARD OF REVIEW

Because all of Lozano's Points Relied On challenge the trial court's exclusion of evidence, this Court applies the highly deferential "abuse of discretion" standard of review. Missouri Courts have characterized the abuse of discretion standard as "quite severe," holding that an appellate court presumes the correctness of a trial court's action

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5 *See* Order (A59 – A60).

6 *See* Memorandum Supplementing Order ("Memorandum") (A61 – A86). While this Memorandum is not controlling precedent for this Court, BNSF respectfully urges the Court to carefully consider it as it contains a helpful summary of the relevant law, provides a close analysis of the evidence presented at trial, and highlights disparities in Lozano's Points Relied On, which are central to BNSF's waiver arguments below.

7 *See* Application for Transfer (A87 – A99).

and reverses only when the ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Aliff v Cody*, 26 S.W.3d 309, 314 (Mo. Ct. App. 2000); *accord Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 73 (Mo. banc 1999). "[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Aliff*, 26 S.W.3d at 314.

With regard to the evidentiary issues, a trial court has considerable discretion in deciding whether to admit or exclude evidence at trial. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo. banc 2005); *Aliff*, 26 S.W.3d at 314. Appellate courts give great deference to the trial court's evidentiary rulings and will reverse the trial court's decision on the admission of evidence only if the court "clearly abused its discretion." *Madorie*, 156 S.W.3d at 355.

On the specific issue of expert testimony, this Court has long recognized that a "trial court's decision whether to admit an expert's testimony will not be disturbed on appeal absent an abuse of discretion." *State v. Bowman*, 337 S.W.3d 679, 699 (Mo. banc 2011), reh'g denied (May 31, 2011)(citing *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299 (Mo. banc 2011)); *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010), as modified (May 25, 2010)(citing *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 129–130 (Mo. banc 2007)); *accord McGuire v. Seltsam*, 138 S.W.3d 718, 721 (Mo. banc 2004)(holding that whether expert opinion testimony satisfies the requirements of section 490.065 "is a matter of trial court discretion."). This

Court has also recognized that this discretion extends to the trial court's determination of the witness's qualifications. *State v. Brown*, 998 S.W.2d 531, 549 (Mo. banc 1999)(holding that the qualifications of a witness to render an expert opinion lie within the trial court's discretion); *Mehra v. Mehra*, 819 S.W.2d 351, 355 (Mo. banc 1991)(same).

In reviewing the correctness of a trial court's decision, an appellate court is not limited to the rationale for the objection made or the reasons expressed by the trial court for excluding the evidence; rather, the trial court's ruling will be upheld when there is "any recognizable ground on which the trial judge ***could have*** rejected the evidence." *Aliff*, 26 S.W.3d at 315 (emphasis added). "Once the appellate court has found that the trial court had alternative choices that would not yield a result contrary to the law…the review ends, and the appellate court will affirm any of those choices." *Id.*

Even where there is error, not every error in admitting or excluding evidence warrants reversal. *Id.* Upon finding an abuse of discretion, the appellate court will reverse only if the prejudice resulting from the improper admission or exclusion of evidence is "outcome-determinative." *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 216 (Mo. Ct. App. 2010). In other words, a failure to admit evidence does not require reversal unless the appellant demonstrates that the error "materially affected the merits of the action." *Aliff*, 26 S.W.3d at 315. A trial court's decision will not be reversed "unless there is a substantial or glaring injustice." *Id.*

Lozano urges a more liberal standard of review that is at odds with the governing law and issues raised in this appeal, citing to select excerpts from certain distinguishable

cases to support the contention that the exclusion of any evidence is "presumed prejudicial."[8] Of course this is completely inconsistent with the long line of precedent, from this Court and others, recognizing the unique role the trial court plays in making evidentiary determinations, and the significant deference to be afforded those decisions.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE RELATING TO OTHER PLACES THE END-OF-TRAIN DEVICE MIGHT HAVE BEEN STORED (RESPONDING TO LOZANO'S POINT I).

In Point I of Lozano's Substitute Brief, Lozano argues that the trial court erred in excluding evidence that the ETDs could have been placed in the compressor compartment as "an alternative method of storage" and as an "alternative method of providing reasonably safe conditions for work."[9] The introduction of this "reasonably safe conditions" argument represents a marked shift from the arguments Lozano raised in his Brief before the Court of Appeals and in his Motion for New Trial, and on these grounds alone, this Court could determine that Lozano has waived this argument.

But these arguments also fail for the equally fundamental reason that they focus exclusively on the trial court's general motion in limine ruling, which is not a grounds for appeal, and ignore the specific evidence the trial court actually excluded and his rationale for excluding it. The evidence the trial court actually excluded related to fire hazards,

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8 *See* Lozano's Substitute Brief at pp. 22-23.

9 *See id.* at pp. 19-20, 23-24.

tripping hazards, and other dangers that Lozano did not and could not have encountered, and was thus excluded as irrelevant and prejudicial. Likewise, the trial court found that Lozano's proposed "alternative location" was purely speculative. Lozano's exclusive focus on the trial court's general motion in limine ruling is wrong.

Moreover, Lozano's argument here completely confuses the distinct concepts of "work methods" and "work conditions," and attempts to apply an "alternative work method" analysis to a condition that was not a work method at all. A work method is a means of performing a certain task. A method is not the same as a condition. The task Lozano was performing when he was injured was lifting an ETD. He was not storing the ETD. So the only relevant consideration of an alternative "method" would be whether there was an alternative method of performing the task he was actually performing when he was injured, i.e. lifting the ETD from behind the refrigerator.

Furthermore, the only evidence Lozano proffered in support of his contention that the compressor compartment was a safer alternative location for storing ETDs was for reasons completely unrelated to the actual hazards he faced. Lozano's own evidence provided no basis for concluding that the simple act of lifting and carrying an ETD was inherently unsafe. The only unsafe condition was the specific location behind the water cooler that required Lozano to lift from an awkward position. Thus, under Lozano's own evidence, had the ETD been on the floor of the cab where he typically found them, there would have been no basis to hold BNSF liable.

Lozano also presented no evidence that storing the ETDs in the compressor room was a safer alternative method of removing the ETDs from the place that they were

located, or that any dangers inherent in lifting and moving an ETD would have been avoided by storing it somewhere else. Ultimately, the only danger presented was the unique (and unprecedented) placement of the ETDs behind the water cooler. Obviously, it was the existence of this condition that was the hazard, and Lozano was given every opportunity to describe the supposed perils of the task he was actually performing.

For each of these reasons, the trial court did not abuse its discretion in excluding this evidence, and the trial court should be affirmed.

A. Lozano failed to raise the argument that storing ETDs in the compressor compartment was an "alternative method of providing reasonably safe conditions for work" in his Point Relied On before the Court of Appeals, or in his Motion for New Trial, and therefore waived that argument.

In Point I of his Brief before the Court of Appeals, Lozano argued that evidence of the compressor room as an alternative storage location was admissible as an alternative "work method."[10] Lozano's Point I made no argument about "reasonably safe conditions." In fact, the Court of Appeals explicitly recognized that Lozano's Point I "[did] not contain a claim that he was not allowed to present evidence of an **unsafe condition** but only that evidence regarding alternative **methods** of the storage of the ETDs was excluded."[11] Finding that Lozano's claim of an "unsafe condition" was not

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[10] *See* Appellant's Brief, Pt. I at p. 18 (A18).

[11] *See* Memorandum at p. 8 (A68)(emphasis added).

contained in Point I, the Court of Appeals addressed only the exclusion of evidence of the alternative storage location.[12]

Likewise, in both his Motion for New Trial and his Brief in Support of that Motion, when referring to alternative locations where the ETDs could have been stored, Lozano argued only that the trial court erred in excluding evidence of "alternative **methods**." LF 102-107, 168-173 (emphasis added). Neither Lozano's Motion for New Trial nor his Brief in Support contained a separate argument contending that the trial court's exclusion of evidence that the ETDs could have been stored in the compressor compartment related to unsafe conditions for work.

Only adding to the confusion, as the Court of Appeals recognized, in both his Brief to the Court of Appeals (p. 26; A26) and his Motion for New Trial (LF 103), Lozano uses the terms "method" and "location" interchangeably.[13]

Now, for the first time, Lozano argues in Point I that evidence that the ETD could have been stored elsewhere is admissible to show an "alternative method of providing a

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[12] *See id.*

[13] *See id.* at n. 8 (referring to Lozano's argument that the excluded testimony demonstrated "a safe, alternative location, i.e., method, wherein the end-of-train devices could have been placed in which event Plaintiff would not have had to remove them from behind the refrigerator, thereby avoiding the unsafe condition").

safe workplace."[14] Lozano cannot raise this argument for the first time in his Brief before this Court.

Rule 84.04(d), which governs points relied on, requires Lozano to "(A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Mo. S. Ct. R. 84.04(d)(1); *Ward v. United Eng'g Co.*, 249 S.W.3d 285, 287 (Mo. Ct. App. 2008). This requirement "is not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts." *Kieffer v. Gianino*, 301 S.W.3d 119, 120 -121 (Mo. Ct. App. 2010)(quoting *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. Ct. App. 1978)). Rather, this rule ensures that the opposing party is given notice "as to the precise matters that must be contended with and to inform the court of the issues presented for review." *Washington v. Blackburn*, 286 S.W.3d 818, 821 (Mo. Ct. App. 2009)(*quoting Eddington v. Cova*, 118 S.W.3d 678, 681 (Mo. Ct. App. 2003)).

The failure to comply with Rule 84.04(d) preserves nothing for appeal. *Washington*, 286 S.W.3d at 821; *see also Whetstone Baptist Church v. Schilling*, 2012 WL 3094954 at *7, n.6 (Mo. Ct. App. S.D. July 31, 2012)("Claims not presented in the point relied on are not preserved for review."); *D.L.C. v. Walsh*, 908 S.W.2d 791, 800 (Mo. Ct. App. 1995)(holding that any matter not raised in a "point relied on" is considered abandoned and is no longer an issue on appeal); *Schmidt v. Warner*, 955

[14] *See* Lozano's Substitute Brief at pp. 19-20, 23-24.

S.W.2d 577, 584 (Mo. Ct. App. 1997)(finding issues to which an appellant alludes only in the argument portion of his brief are not presented for review).

Yet Lozano attempts to use the substitute brief authorized by Rule 83.08 to introduce new arguments that Lozano (1) never made in the brief he submitted before the Court of Appeals, and (2) never raised before the trial court. This Court's own rules expressly prohibit this practice. Although Rule 83.08 allows an appellant to file a substitute brief with this Court, such brief "shall not alter the basis of any claim that was raised in the court of appeals brief. . . ." Mo. Sup. Ct. R. 83.08. This Court has consistently enforced this admonition and has refused to consider arguments that were not made before the Court of Appeals. *Blackstock v. Kohn*, 994 S.W.2d 947 (Mo. banc 1999)(refusing to consider argument not made before the Court of Appeals); *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997)(same); *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009)(refusing to consider argument in substitute brief that "appeared nowhere in the brief to the court of appeals").

Because Lozano's "reasonably safe condition" arguments were not raised in the brief before the Court of Appeals, they are waived. *Linzenni*, 937 S.W.2d at 727. The Court may therefore deny Lozano's Point I without reaching the merits of his arguments.

B. A trial court's ruling on a motion in limine is interlocutory only, subject to change, and preserves nothing for appeal, and therefore Lozano's continued focus on the trial court's general motion in limine ruling, rather than the trial court's reasoning for excluding particular evidence during Lozano's offers of proof, is misplaced and misleading.

Lozano spends more time focusing on authority that contradicts the trial court's general ruling on a motion in limine than he does in explaining why the trial court's exclusion of the actual evidence presented was in error. Lozano's continued focus on the trial court's general motion in limine ruling, rather than the trial court's specific reasons for excluding the particular evidence offered at trial, is misplaced and misleading.

Challenging a trial court's grant of a motion in limine does not provide any grounds for reversal. The trial court's ruling on a motion in limine is interlocutory only and subject to change during the course of trial. *Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo. banc 2003). In fact, as this Court has recognized, "[a] motion in limine, by itself, preserves nothing for appeal." *Id.* Instead, " '[t]he proponent of the evidence must attempt to present the excluded evidence at trial....' " *Id.* (quoting *State v. Cole*, 71 S.W.3d 163, 175 (Mo. banc 2002)). If the trial court continues to exclude the evidence, the proponent must then make an offer of proof. *Id.*; *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 551 (Mo. Ct. App. 2008). Thus, Lozano must demonstrate that the trial court erred in excluding relevant evidence that he attempted to offer but that the trial court excluded.

Here, the trial court's ruling on the motion in limine was on an abstract legal proposition that was not specific or unique to any particular evidence. T. 20. In fact, during the argument on BNSF's motion in limine, which sought only to exclude evidence of "alternative work methods," Lozano was unable to identify any particular evidence that would be affected by a ruling on safer alternative work methods, stating only that the subject of alternative methods was "a potential topic that plaintiff would get into." *Id*. It was not until the offer of proof itself that Lozano first revealed his "compressor room" theory. At no point before the offer of proof had he attempted to admit this evidence.

To prevail on his argument, Lozano may not simply argue why the trial court's ruling on an abstract principle was wrong but must instead demonstrate why the trial court erred in excluding the evidence that was actually presented. The record provides multiple bases to uphold the trial court's decision, many of which are largely unrelated to "alternative work methods." For example, much of the actual testimony from Lozano's witnesses suggested that the compressor room was a superior location for ETDs because, in this location, they would not have constituted slip, trip, or fire hazards, or risked becoming projectiles in the event of a collision. *See* Tr. 177. In other words, Lozano's proposed alternative "method" had nothing to do with alleviating the risks inherent in the task he was performing when he was injured, but rather reduced the risks of tripping, being burned in a fire, or hit by a flying object if the train derailed. Such evidence was wholly irrelevant in a case where Lozano did not slip or trip, was not struck by an airborne ETD, and was not burned. Other evidence the trial court excluded as prejudicial, hypothetical, or purely speculative. *See* Order Denying Plaintiff's Motion for

a New Trial, pp. 1-3, LF 190-92; Tr. 218. The trial court provided thoughtful analysis for each of his evidentiary decisions.

Lozano wants badly to focus on the trial court's general alternative methods ruling in the abstract because the actual evidence he offered was inadmissible for several additional reasons. But looking to the specific evidence offered, and the trial court's reasoning for excluding it, it is clear that the trial court was acting well within its discretion in properly excluding that evidence for other reasons as well.

C. The trial court did not abuse its discretion in excluding this evidence.

The trial court acted well within its broad grant of discretion in excluding Lozano's proffered evidence that the ETDs might have been stored elsewhere in the locomotive because such evidence was irrelevant to the issues in the case. To be admissible, evidence must be (1) logically relevant, and (2) legally relevant. *Murrell v. State*, 215 S.W.3d 96, 116 (Mo. banc 2007). "Evidence is 'logically relevant' if such evidence tends to make the existence of any material fact more or less probable than it would be without the evidence." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). Evidence is "legally relevant" if the usefulness of the evidence, or its probative value, outweighs its costs, namely the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

Trial courts are afforded particular deference where an evidentiary decision involves a "subjective determination of relevancy." *Ziolkowski v. Heartland Reg'l Med.*

Ctr., 317 S.W.3d 212, 216 (Mo. Ct. App. 2010); *accord Bowman*, 337 S.W.3d at 699 n. 13 (finding that on questions of relevancy, trial judges are given the "broadest range of discretion" to determine what evidence will tend to prove or disprove a disputed element). Unless that discretion is abused, "the exclusion of evidence on relevancy grounds is not a basis for reversal." *Ziolkowski*, 317 S.W.3d at 216. On appellate review, the issue is not whether the evidence was admissible, but whether the trial court abused its discretion in excluding the evidence. *Id.* Here, the trial court did not abuse its discretion.

1. Lozano's arguments that the ETDs could have been stored in the compressor compartment are irrelevant because there was no evidence that storing the ETDs there was a safer alternative method of performing the task that Lozano was actually performing or that storing them there would have eliminated the hazard that caused Lozano's injury.

In Point I of Lozano's Substitute Brief, Lozano argues that the trial court erred in excluding evidence that ETDs could have been placed in the compressor compartment instead of in a locomotive cab. Lozano asserts that under FELA, he had a right to present such evidence in order to support his claim that "alternative methods of storage" and "alternative methods of providing reasonably safe conditions for work" were available to BNSF. But the task that Lozano claims caused his injury was removing ETDs from behind the refrigerator in a locomotive cab. His Petition specifically alleged that he was:

> required to lift, manhandle, and carry very heavy end-of-train devices. While being forced to carry the devices alone and without mechanical assistance, he picked up a device to move it when he was suddenly caused to feel intense, severe pain in his groin.

Petition at ¶ 8, LF 2. And the only injury he alleges that he incurred was a hernia from the strain of lifting those ETDs from behind the refrigerator.

At trial, Lozano's witnesses described generally how an ETD should never have been behind the cooler or elsewhere in the locomotive cab in the first place. Lozano was permitted to testify that end-of-train devices did not belong in the cabs of locomotives, and should have been at the end of the train instead. *See* Tr. pp. 250-253. But other witnesses testified that they were not aware of anyone ever having been injured while lifting the forty pound devices prior to the instant case, arguably rendering it not a dangerous condition. Still others testified that they had never seen an ETD behind a cooler, and a BNSF general foreman testified that he had never received complaints from employees about ETDs being in the locomotive cabs. Lozano, however, testified that he reported the presence of ETDs in the locomotive cabs to his superiors, though he did not claim to have ever previously reported finding an ETD behind a cooler.

Lozano did testify that he had lifted end-of-train devices many times before without incident. *See* Tr. 350-351. In fact, he estimated that he had lifted ETDs as many as 1,800 times during his years of work at BNSF without ever experiencing an injury. *See id.* Lozano further testified that he did not know of anyone else that had ever been injured while lifting or carrying an end-of-train device. *See id.* at 352. Lozano's own

witness, Joe Bob O'Neal, who likewise recalled having handled ETDs probably hundreds of times, admitted that he had never hurt himself lifting or carrying them and, like Lozano, was not aware of anyone else who had hurt himself handling an ETD. Thus Lozano's own evidence provided no basis for concluding that the simple act of lifting and carrying an ETD was inherently unsafe.

In this case, the only relevant unsafe condition was the specific location behind the water cooler that required Lozano to lift the ETDs in an awkward position. Ironically, had the ETD been on the floor of the cab or in the nose of the locomotive, where Lozano typically found and removed them, he would not have been hurt at all. The method he used to remove the ETD was to lift it manually. Lozano presented no evidence that there was a safer alternative method of removing, lifting, or carrying ETDs—such as with the assistance of a hoist, dolly, or extra set of hands. In fact, he admitted that assistance from another person would have been futile because the available space would not allow two persons to fit. Tr. 270.

Lozano simply wanted to have an opportunity to argue to the jury that if the ETDs had been somewhere else, "Appellant would not have had to remove them from behind the refrigerator, thereby avoiding the unsafe condition and his resulting injury."[15] This argument is circular because it begs the question of why the condition he encountered was itself unsafe. Under the particular facts of this case, presenting evidence about other, hypothetical locations the ETD could have been stored would not have helped the jury

[15] Lozano's Western District Brief at p. 26 (A26).

determine whether the location where it was actually stored was reasonably safe, but merely would have confused and misled them. *Sladek*, 835 S.W.2d at 314.

Moreover, Lozano did not proffer any evidence as to why storing ETDs in a compressor room, or in any other location, would have reduced his risk of injury. Lozano did not proffer any evidence from his sole medical witness, Dr. McCroskey, that Lozano's injury would not have occurred if Lozano would have lifted and carried the ETD from a different location. And how the placement of the ETDs in the compressor room would have made Lozano's job safer and his injury less likely was entirely unclear. As the Court of Appeals pointed out, even if the ETDs were stored on racks in the compressor compartment on the train, as Lozano suggests, "someone would still have to lift and move them into and out of the storage racks in the compressor compartment. At best this evidence suggests that if the alternative that Lozano suggests had been implemented, it would not have been him, but someone else who may have been injured lifting and carrying the ETDs."[16]

Lozano's offers of proof contained no evidence—from himself, O'Neal, or Summers—that his having to lift and carry an ETD from a compressor room would have reduced the likelihood of Lozano's injury. And to establish that this alternative location was safer, it would have been necessary to present evidence from a competent expert to establish how the alternative location would have prevented the injury that Lozano suffered. No such evidence was presented.

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[16] Memorandum at pp. 9-10 (A69-A70).

In fact, the only reason that Lozano and his witnesses suggested that the compressor room was a superior location for ETDs was, again, because in this location, they would not have constituted slip, trip, or fire hazards or risked becoming projectiles in the event of a collision. When asked why the compressor room was a safer place to store an ETD, Summers said, "Nobody riding back there and if something come loose during a derailment if it got to flying around it wouldn't injury anybody." Tr. 177. In other words, Lozano's proposed alternative "method" had nothing to do with alleviating the risks inherent in the task he was performing when he was injured, but rather reduced the risks of tripping, being burned in a fire, or hit by a flying object if the train derailed. Such evidence was wholly irrelevant in a case where Lozano did not slip or trip, was not struck by an airborne ETD, and was not burned. The trial court was well within its discretion in finding that the evidence was not probative of any disputed fact, or alternatively, that any arguable probative value of such evidence was far outweighed by its potential negative effects. *See Sladek,* 835 S.W.2d at 314.

Ironically, if the purpose of storing ETDs in the compressor room was to prevent injuries from tripping hazards, Lozano's suggested alternative was scarcely a safer alternative. 49 C.F.R. § 229.119(c) provides, "Floors of cabs, passageways, ***and compartments*** shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping, or fire hazard." 49 C.F.R. § 229.119(c). In *Kehdi v. BNSF Ry. Co.*, 2007 WL 2994600 (D. Or. Oct. 11, 2007), the plaintiff sought damages for an injury caused by a slip in oil on the floor of a locomotive's compressor room. The trial court, in granting summary judgment for the plaintiff on the issue of liability, held that the

compressor room was a "compartment" within the meaning of section 229.119(c) and that oil on the compressor room's floor constituted a violation of the LIA. *Id*. at *4. Under this authority, Lozano's theory that the compressor room was a superior location to place ETDs ignores the implications of the LIA and implementing regulations: if it was improper to place ETDs in the cab of a locomotive, it was likewise improper to place them in the compressor compartment, and what Lozano characterized as a "safe" alternative was in fact a violation of federal regulations. [17]

Finally, Lozano's evidence of alternative methods was purely speculative and hypothetical, as the trial court duly noted. Neither Lozano, nor Mr. O'Neal, nor Mr. Summers testified that ETDs were ever actually stored or transported in a locomotive's compressor room. They merely pointed out the compressor room had enough open space to accommodate an ETD and proposed a novel theory that they might have been stored there instead. Summers and O'Neal even surmised that it might be possible to construct a rack specifically to carry ETD's, Tr. 177, 211, though there was no evidence that such a rack existed, had ever been used, would actually work, or, most importantly, reduce the risk of the injury that Lozano actually suffered.

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[17] BNSF does not suggest that an ETD located either in a cab or in a compartment constituted a violation of the LIA or implementing regulations at the time of Lozano's injury. As stated above, the LIA applies only to locomotives that are "in use" and does not apply to a locomotive that is in an inspection or maintenance terminal. *Steer*, 720 F.2d at 976.

This case is legally and factually quite similar to the Eastern District's holding in *Ewing v. St. Louis Sw. Ry. Co.*, 772 S.W.2d 774, 775 (Mo. Ct. App. 1989). In *Ewing*, the plaintiff was a traveling railroad mechanic who had arrived on the scene to replace the clutch on a truck. *Id.* at 774-75. He attempted to locate other members of the maintenance group to assist him, but they were out of radio range. *Id.* at 775. He proceeded to do the job alone. *Id.* The job was frequently done by one person, but some mechanics preferred to have an assistant—it was the mechanic's decision. *Id.* While using a wrench to tighten the final bolt, his wrench slipped and he hit his elbow hard against the gravel-covered ground. *Id.* He felt immediate, severe pain in his elbow. *Id.*

The *Ewing* plaintiff sued the railroad, contending that it failed to provide him a safe place to work and a reasonably safe method to do the work. He "hypothesize[d] several possibilities of things the defendant could and should have done to make the job safer," i.e., somehow bring the truck to the shop to make the repair (which was over 100 miles away), not require the work to be done on a rocky parking lot surface, provide additional help in doing the work, and/or provide a transmissions jack to support the transmission. *Id.* at 776.

In *Ewing*, the court noted that an employee's case, to be submissible under FELA, must include all the same elements as are found in a common-law negligence action. As such, the court recognized that "[t]here must therefore be evidence to connect the injury to some negligence on the part of the defendant." *Id.* The court held that the plaintiff did not establish that his injury was the result of any negligence on the part of the defendant. *Id.* at 777.

Here, Lozano was not out of radio range or otherwise unable to request assistance. Rather, he did not even attempt to request help. He had lifted ETDs from locomotive cabs at least twice a week for over eighteen years. Like the plaintiff in *Ewing*, Lozano did nothing more than assert a hypothesis—namely that the ETD might be better stored in the compressor room. Yet, suggesting that it be stored in the compressor room is not a proposed safer alternate method of moving an ETD as Lozano has alleged in this case. Further, the evidence did not establish that his injury occurred because he had to move an ETD from a locomotive, something that was a regular occurrence for him; the only theory was that his injury was caused by the awkward way he had to bend in order to lift the ETD from behind the cooler.

Ultimately, what Lozano attempts to pass off as evidence of an "alternative work method" is nothing more than saying that if the condition had not existed, he would not have been hurt. He was given free rein to introduce evidence of why the condition was unsafe, and that evidence all came in. Based on these facts and the evidence presented, the trial court cannot be said to have abused its discretion.

2. Lozano's argument that the trial court erred in excluding evidence that the ETDs could have been stored somewhere else confuses the distinct concepts of "work methods" and "work conditions."

"Work methods" and "work conditions" are two distinct concepts under FELA. Lozano spends a great deal of time analyzing alternative work method cases in an attempt

to establish that the trial court erred in excluding evidence about other places the ETDs could have been stored. *See* Lozano's Substitute Brief at pp. 29-52. Because storing ETDs in a different location is not an alternative method of lifting an ETD (and really not a method of work at all), Lozano uses a semantic sleight of hand to suggest that placing the ETDs elsewhere—which would have eliminated risks of injuries that did not and could not have occurred to Lozano as he performed his job—is evidence of an "alternative method of providing reasonably safe conditions for work." But all of the cases cited by Lozano involved evidence of available alternative methods and tools that would have eliminated the particular hazard that caused the plaintiff's injury. Not one of Lozano's cases involved the novel concept proposed by Lozano here of "an alternative method of providing a safe workplace." [18]

What Lozano attempts to characterize as a "method" is actually a "condition." The error of Lozano's position is illustrated by the following statement:

> In the instant case Plaintiff sought to present evidence of an alternative location on the locomotive for ETDs to be placed and

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[18] Lozano's innovative characterization of an "alternative method of providing reasonably safe conditions for work" is non-sensical. It both conflates and conjoins two distinct theories of negligence under the FELA. For example, MAI 24.01(A) allows the jury to find a railroad liable for negligently failing either to provide "reasonably safe conditions for work" or "reasonably safe methods of work." MAI 24.01(a) (2008 revision).

> secured, the locomotive compressor compartment rather than the cab. This was an **alternative method** of storing any ETDs that were put in the locomotive after being removed from the end of the train. This went directly to whether BNSF was negligent under the applicable reasonable person standard and failed to provide Plaintiff with **reasonably safe conditions for work**. This **alternative method** of using the compressor compartment for ETDs on the locomotive was thus also an **alternative method to provide reasonably safe conditions for work**.

Lozano's Substitute Brief at p. 30. This statement makes no sense either grammatically or logically.

Lozano's own cited cases show how he conflates the concepts of "condition" and "method." Each of the cases that Lozano relied upon in his Brief to the Western District—*Stone v. New York, C., & St. L. R. Co.*, 344 U.S. 407, 409 (1953); *Roth v. Atchison, Topeka & Santa Fe Ry. Co.*, 912 S.W.2d 583 (Mo. Ct. App. 1995); *Welsh v. Burlington N. R. Co.*, 719 S.W.2d 793, 797 (Mo. Ct. App. 1986); *Keith v. Burlington N. R. Co.*, 889 S.W.2d 911 (Mo. Ct. App. 1994); *Euton v. Norfolk & W. Ry. Co.*, 936 S.W.2d 146 (Mo. Ct. App. 1996)—involved situations where the plaintiff was forced to perform a discrete task without the benefit of mechanical means or additional manpower that was actually available and previously used. In *Welsh*, for example, the plaintiff argued that the railroad was negligent in not providing him a cart to assist him in moving propane tanks weighing more than 200 pounds each where such carts had previously and regularly

been used for that same task. 719 S.W.2d at 797; *see also Roth*, 912 S.W.2d at 589 (noting that plaintiff was required to manually lift a crossing plank weighing 360 pounds when mechanical devices were often used to assist in moving such planks); *Keith*, 889 S.W.2d at 915 (citing evidence that the plaintiff was hurt while stacking heavy railroad ties by himself, even though the task was a two-person job); *Euton*, 936 S.W.2d at 150 (citing evidence that a dolly was available for carrying boxes down stairs, that plaintiff had asked for one several times, but that one was not provided). In each of these cases, evidence of the superior methods actually in use showed the deficiencies in the method plaintiff was required to use.

Lozano incorporates each of those cases in his Substitute Brief, and then adds a few extras. *See* Lozano's Substitute Brief at pp. 29-52. But each of the new "alternative work method" cases presented likewise turns on the safety of the method the plaintiff was actually using to perform a discrete task and the availability of alternative methods for performing that task. *See, e.g., Schroeck v. Terminal R. R. Ass'n of St. Louis*, 305 S.W.2d 18, 20-22 (Mo. 1957)(noting that plaintiff was required to use block and tackle for lifting, loading, and unloading transformers weighing up to 1000 pounds when a derrick was available for performing that same task); *Robinson v. CSX Transp., Inc.*, 103 So. 3d 1006, 1009 (Fla. Dist. Ct. App. 2012)(noting that injured plaintiff had been required to perform a shoving movement without a backup hose and shoving platform, despite the fact that plaintiff had requested these safety tools, they were usually available, and were typically used in the industry); *Rodriguez v. Delray Connecting R. R.*, 473 F.2d 819, 821 (6th Cir. 1973)(citing evidence that plaintiff was injured while using an old spike maul to remove

railroad ties despite the fact that a hydraulic spike remover was available for performing that same task); *Edsall v. CSX Transp., Inc.*, 1:06-CV-389, 2007 WL 4608788 *5 (N.D. Ind. Dec. 28, 2007)(citing evidence that plaintiff was injured using claw bar to remove railroad spikes where hydraulic spike puller had been used in the past and was requested but was in the shop being fixed); *Gorman v. Grand Trunk W. R.R., Inc.*, 2009 WL 2448604 *6-7 (E.D. Mich. Aug. 10, 2009)(noting that plaintiff had been injured while changing brake shoes from a lying position despite the fact that the use of pits or elevated tracks had been used in the past and could be made easily available).

The new Missouri case that Lozano inserts and relies most heavily upon here, *Elliott v. St. Louis Sw. Ry. Co.*, 487 S.W.2d 7 (Mo. 1972), was actually not an "alternative methods" case at all, but rather only addressed "reasonably safe **conditions** for work." 487 S.W.2d at 15-16 (emphasis added). Plaintiff was injured while crossing railroad tracks in a busy train yard. The evidence sought to be admitted was that other train yards had tunnels or overpasses. This evidence was not offered as an alternative method of performing a particular task, but as a possible means of making the work conditions in the yard "reasonably safe." *Id.*

Lozano not only confuses the concepts of "methods" and "conditions," but also misunderstands the purpose of admitting evidence of alternative methods. Evidence of alternative methods or tools illustrates why the method actually used was unsafe. For example, requiring a plaintiff to lift by himself an item that is customarily lifted by two or more employees implies that an item is too heavy for a single person to lift alone or without the aid of mechanical devices. Evidence that the railroad typically uses an

automated tool to perform a task that plaintiff had to perform manually is another example.

But this is not a case where BNSF asked Lozano to depart from standard procedures or eschew equipment that was normally made available to assist in a particular task. Instead, Lozano and his two witnesses merely hypothesized that an alternative location would have been a better place to store the ETDs. Such evidence was, as the trial court correctly observed, pure speculation. Tr. 218; *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 578 (1951) (holding that "[s]peculation cannot supply the place of proof."); *Ewing v. St. Louis Sw. Ry. Co.*, 772 S.W.2d 774, 776 (Mo. Ct. App. 1989)(dismissing plaintiff's proffered alternative as "the height of speculation").

The central question in the case was not how BNSF might improve its procedures, but rather whether it provided Lozano with a reasonably safe work place. Lozano's proffered evidence would not have assisted the jury in resolving this question but merely would have confused and misled it. Therefore, the trial court properly excluded this evidence, because it was speculative, irrelevant, and otherwise improper.

3. The Trial Court's ruling was consistent with other cases decided under the FELA.

The trial court's decision was particularly appropriate here because this is a FELA case. Under FELA, the proper inquiry is whether the method prescribed by the employer was reasonably safe, not whether the employer could have employed a safer alternative

method for performing the task. *Stillman v. Norfolk & W. Ry.*, 811 F.2d 834, 838 (4th Cir. 1987). This principle finds support in a long line of FELA precedent. *See, e.g.*, *Soto v. Southern Pac. Transp.*, 644 F.2d 1147, 1148 (5th Cir. 1981), *cert. denied*, 454 U.S. 969 (1981) (finding "[t]hat there are other, arguably more advanced, methods in use by the defendant for [accomplishing the task at hand] is of no significance where the method in use by [the plaintiff] was not an inherently unsafe one."); *Atl. Coast Line R. R. v. Dixon*, 189 F.2d 525, 527 (5th Cir. 1951); *Chicago, R. I. & P. R. Co. v. Lint*, 217 F.2d 279, 282-83 (8th Cir. 1954) (holding "[t]he fact that there may have been a safer method than that employed, or that danger might have been avoided by action in a different manner, does not necessarily make an act negligent"); *McGivern v. N. Pac. Ry. Co.*, 132 F.2d 213, 218 (8th Cir. 1942); *McKennon v. CSX Transp., Inc.*, 897 F.Supp. 1024, 1027 (M. D. Tenn. 1995), *aff'd*, 56 F.3d 64 (6th Cir.1995) (finding "[t]he fact that there may have been an automated, or safer method, of work does not automatically render the chosen method unsafe or negligent for purposes of FELA. Under FELA, the proper inquiry is whether the method prescribed by the employer was reasonably safe, not whether the employer could have employed a safer alternative method for performing the task.") (internal citation omitted).

In *Stillman*, for example, the Fourth Circuit found that the district court acted properly in sustaining the railroad's objection to the plaintiff's testimony concerning a safer, alternative way to install gears in railroad cars. 811 F.2d at 838. The court held that, under the FELA, the question the jury had to decide was whether the Railroad had exercised reasonable care for the plaintiff's safety, not whether the Railroad could have

employed a safer method for installing gears. *Id.* Thus, the Fourth Circuit recognized that it was within the district court's discretion to exclude the testimony as irrelevant.

That other Missouri appellate courts may have affirmed a trial court's admission of evidence of certain alternative work methods under the unique facts of other cases does not mean that such evidence is always admissible as a matter of law or that a court necessarily abuses its discretion in excluding such evidence. Again, it is only where reasonable minds cannot differ that a court abuses its discretion. *See Rodriguez*, 996 S.W.2d at 73; *Anglim*, 832 S.W.2d at 303; *Ziolkowski*, 317 S.W.3d at 216 (quoting *Williams*, 281 S.W.3d at 872).

The consistency between the trial court's ruling in this case and those from the numerous other FELA cases cited above indicates that the trial court properly acted within its broad discretion in excluding Lozano's proffered evidence. *See Stillman*, 811 F.2d at 838; *Soto*, 644 F.2d at 1148; *Dixon*, 189 F.2d at 527; *Lint*, 217 F.2d at 282-83; *McGivern*, 132 F.2d at 218; *McKennon*, 897 F. Supp. at 1027. It goes without saying that two courts faced with the proffer of similar evidence can reach different conclusions, both while acting within their broad respective discretion; because reasonable minds can differ, and various courts clearly have differed, on whether this type of evidence is admissible, the trial court cannot be said to have abused its discretion in reaching this conclusion. *See Rodriguez*, 996 S.W.2d at 73; *Ziolkowski*, 317 S.W.3d at 216 (quoting *Williams*, 281 S.W.3d at 872).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE THAT END-OF-TRAIN DEVICES CAN CONSTITUTE TRIPPING HAZARDS (RESPONDING TO LOZANO'S POINT II).

In both his Point Relied On before the Court of Appeals, and in his Motion for New Trial, Lozano contended that "tripping hazard" evidence was admissible for the single purpose of showing "foreseeability," and therefore waived the argument he raises now that this evidence is relevant to show "unsafe conditions for work."

In Point II of his Brief before the Court of Appeals, Lozano argued that evidence that end-of-train devices constitute "tripping hazards" in locomotive cabs was relevant for the sole purpose of establishing "foreseeability" of injury.[19] Lozano's Point II made no argument about "reasonably safe conditions for work."

Likewise, in both his Motion for New Trial and his Brief in Support of that Motion, when referring to "tripping hazards," Lozano argued only that this evidence was relevant to establish "foreseeability." LF 107-109, 173-175. Neither Lozano's Motion for New Trial nor his Brief in Support contained a separate argument contending that the trial court's exclusion of tripping hazard evidence related to unsafe conditions for work.

Now, for the first time, Lozano argues in Point II that evidence that ETDs in locomotive cabs constitute tripping hazards is admissible to show a failure to provide

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[19] *See* Appellant's Brief, Pt. II at p. 19 (A19).

"reasonably safe conditions for work."[20] For the same reasons articulated in Section II(A) above, Lozano cannot raise this argument that he did not include in his Point Relied On below for the first time in his Substitute Brief on Appeal; therefore, Lozano has waived this argument, and this Court may therefore deny Lozano's Point II without reaching the merits of this argument. *See* Mo. S. Ct. R. 84.04(d)(1); Mo. S. Ct. R. 83.08; *Blackstock*, 994 S.W.2d 947; *Linzenni*, 937 S.W.2d at 727; *Essex Contracting, Inc.*, 277 S.W.3d at 656; *Ward*, 249 S.W.3d at 287; *Washington*, 286 S.W.3d at 821; *Kieffer*, 301 S.W.3d at 120-21.

But this "tripping hazard" evidence is excludable for several other fundamental reasons as well. In Point II, Lozano argues that the trial court erred in excluding evidence that an end-of-train device located in a locomotive cab could constitute a tripping hazard. *See* Lozano's Substitute Brief, pp. 52-64. Once again, the trial court's decision to exclude this evidence was a purely evidentiary determination, the trial court was acting well within its discretion in making this determination, and this Court should afford great deference to the trial court's decision to exclude this evidence. *See, e.g.*, *Madorie*, 156 S.W.3d at 355; *Williams*, 281 S.W.3d at 872; *Aliff*, 26 S.W.3d at 314-15; Order Denying Plaintiff's Motion for a New Trial, pp. 2-3; LF 191-92.

The primary problem with Lozano attempting to introduce this evidence was that it was neither legally nor logically relevant in the present case. *See Murrell*, 215 S.W.3d at 116; *Sladek*, 835 S.W.2d at 314. Lozano alleged that he was injured while lifting an

[20] *See* Lozano's Substitute Brief at pp. 20-21, 52-53.

ETD. The sole injury he alleged was a hernia caused by lifting. According to Lozano's own pleadings and testimony, the ETD he lifted was stored securely behind a refrigerator, off the cab floor, *and therefore could not have constituted a tripping hazard*. During his offer of proof, Lozano testified as follows:

Q: Mr. Lozano, you didn't trip on the end-of-train device, did you?

A: Not that one.

Q: One of the two that you are talking about, they were both according to you behind the refrigerator?

A: Correct.

Q: There's no way that you could have tripped on those?

A: Not those two.

Tr. 374. Plaintiff's own witness, Terry Summers, similarly admitted during his offer of proof that an ETD behind a refrigerator was not a tripping hazard. Tr. 176.

As a result, any evidence that an ETD could potentially be a tripping hazard was logically irrelevant here because (1) the ETD was not a tripping hazard in this case, and (2) Lozano's injury was not caused by tripping over an ETD. *See Sladek*, 835 S.W.2d at 314. It was also legally irrelevant, particularly because it would have created the danger of unfair prejudice, confusion of the issues, misleading the jury, and wasting time. *See id.* The issue the jury had to decide was whether the ETD, in its actual location, posed an unreasonable risk of harm to Lozano. Because Lozano did not trip over an ETD and, by his own admission could not have, any evidence about whether an ETD, under different circumstances, potentially *could have been* a tripping hazard would not have helped the

jury in making this determination, but only would have confused and misled them. On these grounds alone, the trial court was justified in excluding this evidence. *See Ziolkowski*, 317 S.W.3d at 216.

Lozano here attempts to argue, however, that evidence of the potential for slipping and tripping hazards was necessary to establish the "foreseeability" of Lozano's injury. *See* Lozano's Substitute Brief, pp. 52-64. This argument fails for two reasons, one procedural, the other substantive.

Procedurally, Lozano's argument that his tripping hazard evidence was essential to his showing of foreseeability ignores the way in which the jury was instructed and the issues it was required to resolve. At Lozano's request, and over BNSF's objection, the trial court gave an instruction based on MAI 24.01(A) that plaintiff had tendered. Tr. 446; LF 95. BNSF argued that foreseeability of the condition ***and*** its potential for causing harm were disputed elements that needed to be added to the jury instruction, per MAI 24.01(B).[21] Tr. 444-46. The trial court overruled BNSF's objection and gave

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[21] Paragraph Second of MAI 24.01(B), to be given in cases where actual or constructive knowledge is disputed, requires the jury to find both that "conditions for work were not reasonably safe and defendant knew or by using ordinary care could have known of such conditions ***and that they were not reasonably safe."*** MAI 24.01(B)(2008 revision)(emphasis added). Thus, BNSF submitted that its knowledge that the condition might cause harm was a disputed fact to be decided by the jury. By granting plaintiff's

Lozano's proffered instruction as submitted. Tr. 446. In denying Lozano's Motion for New Trial, the trial court observed that foreseeability was not among the issues the jury was required to decide. LF 192. Thus, Lozano's argument that the excluded evidence was necessary to prove an element that his own instruction effectively withdrew from the jury is without merit.

The tripping hazard issue was also outside the pleadings. As the trial court correctly noted, Lozano's Petition made no allegation that the ETD was a slipping or tripping hazard. Rather, his Petition alleged only that he was required to "manhandle" extremely heavy ETDs as part of his job and suffered a hernia in the process. *See* LF 2. The trial court was therefore also within its discretion to exclude evidence of BNSF's supposed violation of a rule against slipping and tripping hazards because that issue was beyond the pleadings.

Lozano's foreseeability argument is also deficient substantively. To establish a submissible case under FELA, a plaintiff does have to show (1) that the railroad had a duty to provide him with a reasonably safe place to work, (2) that the railroad breached its duty of care, (3) that this lack of due care played a part in producing the plaintiff's injury, and (4) that the injury was reasonably foreseeable. *Duncan v. Am. Commercial Barge Line, LLC*, 166 S.W.3d 78, 85 (Mo. Ct. App. 2004). Looking at the foreseeability

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request to instruct the jury using MAI 24.01(A), the trial court effectively removed the issue of foreseeability from the jury's determination.

requirement, some courts have determined that "[i]t is knowledge or anticipation of the possibility of harm to plaintiff, not of the exact nature of the injury, that is determinative" and "the foreseeability requirement is satisfied if some injury, rather than plaintiff's precise injury, [was] reasonably foreseeable." *See Stewart v. Alton & S. Ry. Co.*, 849 S.W.2d 119, 125 (Mo. Ct. App. 1993); *Keith*, *supra*, 889 S.W.2d at 916. Lozano latches onto this language, attempting to argue that all he was required to show was that "***some*** injury, not necessarily his precise injury, was foreseeable," and therefore evidence that an ETD can be a tripping hazard should have been admitted. *See* Lozano's Substitute Brief, pp. 53-54. This is simply wrong. Even if a particular injury does not need to be foreseeable, the risk of some injury does.

As stated above, Lozano was not hurt because he tripped, and he and his own witness conceded that the ETDs that Lozano allegedly removed were not tripping hazards. Evidence that an ETD can constitute a tripping hazard under different circumstances would have been nothing more than hypothetical evidence about a condition that did not exist, and its potential for causing an injury that did not and could not have occurred. So essentially, Lozano argues that because an ETD left on the floor of a locomotive might pose a tripping hazard, the jury may infer that BNSF should have foreseen that an ETD left where it was not a tripping hazard posed the risk of causing a hernia. This is like arguing that a supermarket should have foreseen that a clerk lifting a 40-pound case of peanut butter would suffer a hernia because peanut butter can cause anaphylactic shock in those with peanut allergies. To call Lozano's argument illogical is an understatement.

Under Point II of Lozano's Substitute Brief, Lozano also argues that the trial court erred in excluding certain portions of Paul Schakel's deposition testimony as it pertained to tripping hazards.[22] But the trial court made reasoned and correct evidentiary rulings when excluding these portions of Mr. Schakel's deposition as well, and the trial court cannot be said to have abused its discretion in excluding these portions of testimony.

First, the trial court did not abuse its discretion because this testimony was no different than Lozano's own testimony regarding end-of-train devices. Lozano had already been permitted to testify that end-of-train devices did not belong in the cabs of locomotives (Tr. 250-253), and cumulative evidence is properly excludable. *See State v. Cote*, 60 S.W.3d 700, 706 (Mo. Ct. App. 2001); *Sladek*, 835 S.W.2d at 314.

Moreover, the trial court provided sound reasoning in explaining additional grounds for excluding this testimony. *See* Tr. 83-96, 295-301. The trial court made it abundantly clear that it felt certain portions of the testimony were properly excluded because they had nothing to do with harm or safety, nothing to do with risk or foreseeability, and were therefore irrelevant. *See* Tr. p. 86, lines 4-5; p. 88, lines 17-22. The trial court determined that other portions reflected nothing more than Mr. Schakel's guessing or speculation. Tr. p. 300, lines 12-20. And the remainder the trial court excluded because it was simply more slipping and tripping hazard evidence which, as

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[22] *See* Lozano's Substitute Brief at pp. 55-56. Lozano's arguments relating to the testimony of Paul Schakel were contained in a separate Point Relied On in his Brief filed with the Court of Appeals at pp. at 48-53 (A48 – A53).

discussed at length above, the court had already considered and found to be wholly irrelevant under the facts and circumstances of this case. *See* Tr. p. 22, line 13 through p. 25, line 10; p. 74, lines 8-13; p. 301, lines 8-21.

Even if this Court does not necessarily agree with the trial court's decision regarding the exclusion of these passages of testimony, the trial court could still not be said to have abused its discretion here, and the trial court should be affirmed. *See Ziolkowski*, 317 S.W.3d at 216; *Rodriguez*, 996 S.W.2d at 73; *Williams*, 281 S.W.3d at 872; *Anglim*, 832 S.W.2d at 303. The exclusion of these few sections of Mr. Schakel's deposition did not result in substantial and glaring injustice to Lozano, and the trial court's well-articulated justifications for excluding these few portions of testimony were certainly not so arbitrary or unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *See id.*; *Aliff*, 26 S.W.3d at 315.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING CERTAIN TESTIMONY FROM JOE BOB O'NEAL, TERRY SUMMERS, AND LOZANO HIMSELF (RESPONDING TO LOZANO'S POINT III).

The trial court acted well within its broad discretion in excluding the proffered testimony from Summers, O'Neal, and Lozano himself. In asserting this point, Lozano challenges a ruling that the trial court never made. Lozano claims that the trial court erred in failing to recognize that Summers and O'Neal were qualified to testify as experts based on their years of experience working for the railroad. *See* Lozano's Substitute

Brief at pp. 64-71. The trial court did not make the broad holding that a railroad employee's experience cannot qualify him as an expert. BNSF never made that argument, nor did the trial court accept it.

The proffered testimony was excluded because it was inadmissible under other grounds, irrelevant, not a subject matter which requires expert testimony for the jury to understand, and relied on improper speculation. To the extent the trial court excluded certain portions of the proposed testimony on the grounds that it did not constitute expert testimony, it did so, again, not because it had determined that railroad workers can **never** be qualified to offer expert testimony on **any** subject, or even that these particular witnesses could never qualify as experts, but because these witnesses were not qualified to offer expert opinions on the particular subjects, i.e. medical causation or biomechanics, they proposed to testify about.

The same is true with regard to the proposed testimony of Lozano. Considering that Lozano never designated himself as an expert, see LF 14-16, the trial court would have been justified in excluding any so-called expert testimony from him on this basis alone. But the only testimony that the trial court prohibited Lozano from giving, and that appears in Lozano's offer of proof, concerned the "tripping hazard" and "alternative storage location" subjects.

The proposed "expert" testimony that the trial court is accused of wrongfully excluding falls into two general categories: (1) safety issues presented by ETDs,

including the dangers of projectiles, fires,[23] and tripping; and (2) safer alternative locations to store the ETDs. The relevancy of evidence of safer alternative locations is discussed in Section II, above, while the relevancy of Lozano's tripping hazard evidence is addressed in Section III. The trial court's exclusion of proposed testimony about safer alternatives and whether the ETDs were tripping/projectile hazards had nothing to do with these witnesses' qualifications as experts; rather, this testimony was excluded because the trial court determined that this evidence was prejudicial and completely irrelevant to the facts of this case, no matter where the evidence came from or what qualifications or expertise the witnesses testifying about these matters possessed. *See* Order Denying Plaintiff's Motion for a New Trial, pp. 1-3, LF 190-192.

In his Substitute Brief, Lozano cites to select portions of the trial transcript to suggest that the only reason this proposed testimony was excluded was because the trial court determined that these witnesses were not, and could not be, experts. *See* Lozano's Substitute Brief at p. 65, *citing* Tr. 180-181 and 216. The Court's analysis was not so simplistic. The trial court provided a very thorough analysis of its reasoning, and looking at these entire sections in context, it becomes clear that the trial court took a number of factors into careful consideration, not just whether these witnesses could be experts, but whether the topics which they proposed to testify about were topics that required expert

[23] The trial court actually did permit Lozano to offer testimony about how an ETD might start a fire or become a projectile. Tr. 312-15.

opinion of any kind, and whether the type of evidence proposed would be independently relevant or admissible in this case. *See* Tr. 178-181, 215-219.

Much of Lozano's brief focuses on the general proposition that experience can constitute expertise, and specifically that railroad experience can provide a foundation for relevant and admissible expert opinion in a railroad injury case. *See* Lozano's Substitute Brief, pp. 64-71. As a general proposition, BNSF agrees. But the larger questions are whether expert testimony is necessary at all, and if so, whether there is a nexus between the expert's expertise and the subject matter of his testimony, and whether the proffered testimony constitutes reliable expert testimony. In answering these questions in the negative, the trial court's analysis and approach were correct.

A. The excluded testimony was not necessary to the jury's understanding of the evidence.

It is well recognized that "[e]xpert testimony is allowed only when the expert's competence on the subject is superior to that of an ordinary juror and the expert's opinion aids the jurors in deciding an issue in the case." *Thomas v. Festival Foods*, 202 S.W.3d 625, 627 (Mo. Ct. App. 2006). To be able to offer his or her opinion, "the expert's competence on the subject must be superior to that of the ordinary juror, and the opinion must aid the jury in deciding an issue in the case." *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 208 (Mo. banc 1991); *Vittengl v. Fox*, 967 S.W.2d 269, 279 (Mo. Ct. App. 1998). Expert testimony should not be admitted "unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, of drawing correct conclusions from the facts proved." *Vittengl*, 967 S.W.2d at 279. The

subject matter must be "one with which lay jurors are not likely to be conversant, and one where the expert's opinion would be of value to the jury." *Wessar v. John Chezik Motors, Inc.*, 623 S.W.2d 599, 602 (Mo. Ct. App. 1981).

On the other hand, it is also well recognized that, if the subject is one of "**everyday experience**, where the jurors are competent to decide the issues, then opinion testimony is properly rejected." *Id.* (emphasis added). Where the jury is as competent as the proposed expert to draw conclusions, an expert's testimony is properly excluded. *Vittengl*, 967 S.W.2d at 279. And in passing on whether proffered expert testimony is to be admitted or excluded, again, the trial court has long been held to possess "discretionary latitude," and that discretion is rarely disturbed on appeal. *Wessar*, 623 S.W.2d at 602 (citing *Parlow*, 391 S.W.2d at 325, in which this Court recognized that "[t]he question of the qualification of a witness as an expert in the field concerning which his testimony is sought and the necessity for admission of expert testimony in a given situation rests in the first instance in the sound discretion of the trial[] court, and its decision in those respects is not to be set aside in the absence of showing of an **abuse of discretion**." (emphasis added)).

Although Lozano suggests the trial court erroneously concluded that Mr. Summers, Mr. O'Neal, and Mr. Lozano himself were not experts, he does not explain how their alleged expertise would have helped the jury understand evidence relevant to disputed issues in the case or why the subject matter of their testimony was beyond the understanding of a lay juror. Nothing about the proposed testimony of O'Neal and Summers implicated their narrow expertise as locomotive mechanics. This case did not

involve complex issues involving the intricacies of the mechanical or electrical systems of a diesel locomotive that could be grasped only with the help of an expert. Nor did it involve any difficult concept that a jury would have been unable to grasp without the assistance of an expert—apart from the medical causation issues, which Lozano's surgeon addressed, and which neither O'Neal, Summers, nor Lozano was competent to handle.[24]

The facts of this case were relatively simple. Mr. Lozano claims to have injured himself while straining to lift a forty-pound ETD. Lozano, aided by photographic evidence, described to the jury the configuration of the locomotive cab, the location and height of the refrigerator, the size and weight of an ETD, and where the two ETDs were allegedly positioned when he came upon them. An exemplar ETD was admitted into evidence, and the jury had an opportunity to see, touch, and lift it themselves. Tr. 192, 474. Lozano then described how the cramped space prevented more than one person from lifting the ETDs, how his awkward body position made it difficult to grasp the ETDs, and how he was prevented from using proper lifting techniques. By this point, the jury had already heard from Dr. McCroskey about how lifting an object in the manner Lozano eventually described could contribute to a hernia. Tr. 33.

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[24] *See Pemberton v. 3M Co.*, 992 S.W.2d 365, 369 (Mo. Ct. App. 1999)(holding that an inguinal hernia is a sophisticated injury that generally requires expert medical testimony to prove the causal connection to the accident) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

The trial court correctly recognized that the challenge of lifting a heavy object using poor posture was the sort of "everyday experience" on which everyone is conversant, that the jurors themselves were just as capable of drawing correct conclusions from the facts presented, and that the proposed experts' experience on this subject was therefore not superior to the experience and competence of the jury. *See* Tr. 178-181, 195-200, 215-219; *Seabaugh*, 816 S.W.2d at 208; *Vittengl*, 967 S.W.2d at 279; *Wessar*, 623 S.W.2d at 602.

Additional testimony in the form of "expert" opinion from O'Neal and Summers would not have done anything to help the jury better understand the evidence. O'Neal and Summers were experts in locomotive mechanics—not biomechanics—and Lozano has not explained how their narrow expertise imbued them with any greater knowledge of the physics of lifting an ETD than would be possessed by the average juror. Lifting a forty-pound object—be it a toddler, a potted plant, or a bag of dog food—is not an experience so uncommon that a jury needs to hear expert testimony about it. As the trial court aptly noted, "As far as this particular witness went by testifying that you're supposed to bend your knees and keep the object you're lifting close to you, probably everybody in the jury already knows." Tr. 217. Other courts agree. *See Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990)(finding that in FELA case trial court did not abuse its discretion in excluding expert testimony about safe lifting practices, finding, "The typical juror knows that it is more difficult to lift objects from a seated position, especially when the lift is away from the body rather than close to the body.").

And even though the jurors likely never have had occasion to retrieve an ETD from behind the refrigerator of a locomotive, apparently neither had O'Neal or Summers. Summers did not claim to have encountered an ETD in this particular location before or attempted to lift one in a similar manner under similar circumstances. O'Neal stated expressly he could not recall ever encountering an ETD behind a refrigerator or removing one from this location during his 38 years on the railroad. Tr. 212. And both Summers and O'Neal openly questioned how an ETD could even get behind the refrigerator. Tr. 174, 205. Thus, Lozano apparently stood alone as the only one who had even seen one or attempted to remove an ETD from behind a refrigerator, and he was able to describe his experience in a manner readily understandable to a jury. If neither Summers nor O'Neal had ever experienced the condition Lozano described and wondered how it even existed, their own experience would have contributed nothing to Lozano's own straightforward testimony.

The supposed expert testimony on the hazards of projectiles was likewise excluded as unnecessary to the jury's understanding of the evidence. As the trial court colorfully observed:

> As far as his testimony anything laying around the floor of a cab could be a projectile. I think everybody knows that intuitively. Everybody knows that from driving a car. You know, if you have got a hamburger in the back seat and you stop the car suddenly it might fly into the front seat. There could be projectiles, I understand that but I don't understand what it has to do with expert testimony.

Tr. 217. Notwithstanding the obvious difference between a hamburger and an ETD, Lozano has not explained why Summers and O'Neal's training and experience as locomotive mechanics made them more conversant in elementary physics than the average juror.

As for evidence about the general dangerousness of tripping over something on the floor, here too, the trial court simply recognized that this was the subject of "everyday experience," that this is a topic on which everyone is conversant, that the jurors themselves were just as capable of drawing correct conclusions from the facts presented, and that this testimony was therefore properly excluded. *See*Tr.178-181, 195-200, 215-219; *Seabaugh*, 816 S.W.2d at 208; *Vittengl*, 967 S.W.2d at 279; *Wessar*, 623 S.W.2d at 602.

B. The evidence that the trial court prevented Summers and O'Neal from offering was virtually identical to Lozano's own testimony.

O'Neal's and Summers' testimony about the hazards of ETD's that the trial court excluded was virtually identical to the testimony that Lozano himself presented during his case in chief.[25] Lozano's background and qualifications were no different than Summers' and O'Neal's. And as detailed above, Lozano testified at length about the difficulty in removing the ETD from behind the refrigerator. He also testified about the

[25] Compare O'Neal's offer of proof testimony at Tr. 206:19-207:7 and Summers' offer of proof testimony at Tr. 175:4-15 with Lozano's trial testimony at Tr. 268:19-269:9, 281:4-21.

risk that an ETD could become a projectile in the event of a derailment, and how an ETD bumping around in a moving locomotive might cause damage to electrical circuitry, potentially causing a fire. BNSF did not challenge these assertions or present any contrary evidence (though it did vigorously argue that the evidence was irrelevant). The testimony from O'Neal and Summers was not necessary for the jury's understanding of Lozano's testimony, and if admitted, would have been virtual carbon copies of the testimony that Lozano gave, resulting in the jury's hearing the same testimony three times. A trial court has the discretion to exclude cumulative evidence, *see Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 72 (Mo. banc 1999), and the exclusion of cumulative evidence is not considered prejudicial. *Adkins v. Hontz*, 337 S.W.3d 711, 720 (Mo. Ct. App. 2011).

C. The excluded evidence was irrelevant

But ultimately, the trial court was justified in excluding the "projectile" and "fire hazard" testimony as wholly irrelevant to the issues in the case. In his Substitute Brief, Lozano has shifted the focus of this particular argument to the more general concept that ETDs should have been placed in an alternative location, ignoring the why. But this does not change the fact that, during the offer of proof for the testimony of O'Neal and Summers, the explanations they offered for why the ETDs should have been stored somewhere else focused on these theoretical future dangers. However, Lozano was not burned or hit by a flying projectile. Evidence that some hypothetical train crew member could hypothetically be injured from a flying ETD as his train derailed while moving

down the track had no relevance in a case where a locomotive mechanic strained his groin while lifting an ETD from behind the refrigerator of a locomotive—especially one that was sitting still in a repair facility and would not be cleared for movement until it was "lead qualified." The same illogic affects the "fire" evidence.

According to Lozano, it was his responsibility to make locomotives "lead qualified," which included the responsibility of removing from the locomotive cab any item that could pose a risk of injury to those actually operating the locomotive. There was no evidence that the ETD posed a projectile or fire risk to a locomotive mechanic engaged in the task of removing the item from the locomotive while it was parked in a repair facility. The fire and projectile risk could arise only if the locomotive was released from the service track and put in use. But it was Lozano's job to prevent that from happening. Lozano's argument seems to be that because an item not removed from a locomotive could pose a particular risk of injury to another person under circumstances not existing at the locomotive repair facility, the railroad is liable for any wholly unrelated injury suffered by the employee in the process of eliminating the particular risk.

This argument makes no sense. Under Lozano's tortured logic, the railroad would be liable to a locomotive mechanic who pinches his finger while replacing a worn brake shoe, not because the job of replacing the brakes was itself dangerous, but because the defective brakes, if not repaired, posed a risk of injury to an engineer operating the locomotive and could not stop because his brakes did not work. Or the railroad would be liable to a custodian who strains his back picking up a banana peel, since the banana peel, if not picked up, could pose a slipping hazard to someone who steps on it. Not

surprisingly, Lozano has cited no authority supporting the proposition that a railroad is liable to an employee who, while repairing a condition that if not repaired could give rise to a specific injury, suffers an entirely unrelated injury from an entirely different cause. The trial court therefore acted well within his discretion by preventing Summers and O'Neal's testimony on these subjects.

On this particular topic, evidence that an ETD can be a tripping hazard was properly and independently excluded for the reasons previously discussed in Section III of this Brief. The trial court applied this same analysis to Lozano's argument that an ETD can potentially become a projectile hazard. *See id.* The trial court found any such evidence independently inadmissible because it was (1) purely speculative, and (2) completely irrelevant to the dangers and injuries actually at issue in this case.

It is not that Mr. Summers, Mr. O'Neal, or Mr. Lozano himself were prevented from offering any testimony at all. Each of these witnesses was given an opportunity to provide factual testimony based upon their personal experiences as locomotive mechanics and their own personal observations and experiences with end-of-train devices. These witnesses were simply prevented from offering testimony in the narrow area that would have been outside their capacity for expertise, would not have helped the jury, or was excludable on other grounds (i.e. irrelevance or speculation).

The trial court did not abuse its discretion in excluding this evidence. Lozano's contention to the contrary notwithstanding, even if this evidence had been excluded in error, Lozano was not prejudiced by its exclusion, and therefore, the trial court did not abuse its discretion in excluding it. The only issue in this case was Lozano's alleged

injury in lifting the ETD. Accordingly, any hypothetical testimony about other places the ETD could have been stored or other dangers the ETD could have posed under different circumstances would have been, at best, superfluous and irrelevant. In excluding this evidence, the trial court did not adopt or impose an improper standard for the admission of expert testimony; rather, he simply determined that opinion testimony from these witnesses was not relevant or necessary under the particular facts of this case, and that their particular and narrow expertise as locomotive mechanics was unnecessary to the jury's understanding of the evidence. This determination lay exclusively within the trial court's discretion, and he did not abuse it.

CONCLUSION

For the foregoing reasons, the trial court did not err in excluding any of Lozano's proffered evidence. Accordingly, the Court should reject each of Lozano's points relied on and affirm the judgment of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I hereby certify that the foregoing Substitute Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b). This Substitute Brief was prepared using Microsoft Word 2007, in Times New Roman, 13 point font. Excluding the cover page, this Certificate of Compliance, and the Certificate of Service, it contains 15,531 words, which does not exceed the words allowed by Rule 84.06(b).

/s/ Craig M. Leff
Craig M. Leff

CERTIFICATE OF SERVICE

Pursuant to Rule 103.08, I hereby certify that on June 7, 2013, I electronically filed the foregoing with the Clerk of the Court using the Missouri e-Filing system which will give notice of such filing to all parties.

/s/ Craig M. Leff
Craig M. Leff