

Summary of SC92996, *Rafael Lozano v. BNSF Railway Company*

Appeal from the Jackson County circuit court, Judge Jack R. Grate Jr.

Argued and submitted September 11, 2013; opinion issued February 4, 2014

Attorneys: Lozano was represented by Newton G. McCoy, an attorney in St. Louis, (314) 862-0200, and Robert J. Friedman and C. Marshall Friedman of C. Marshall Friedman PC in St. Louis, (314) 621-8400; and BNSF was represented by Craig M. Leff, James M. Yeretsky, Gregory F. Maher and Spencer L. Throssel of Yeretsky & Maher LLC in Overland Park, Kansas, (913) 897-5813.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: An employee appeals a judgment in favor of his employer in a federal statutory negligence case involving injuries he allegedly sustained while moving end-of-train devices (ETDs) at a railway service facility. In a 5-2 decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment, finding the trial court did not abuse its discretion in its evidentiary rulings. Neither evidence the employee proffered to show that unused ETDs should be stored in a locomotive's compressor room, rather than in its cab, nor evidence that storing ETDs in locomotive cabs is hazardous was relevant to the employee's claim that the railway company failed to provide safe work methods or conditions for moving the ETDs. Because this evidence was not relevant to the employee's claims, this Court does not reach the question of whether such issues were proper subjects for expert testimony or whether the employee and his coworkers were qualified to opine about such issues. Further, even had excluding the evidence been error – which it was not – no prejudice resulted. The excluded evidence had no connection to the employee's theories of negligence and, therefore, would not have changed the verdict.

Judge George W. Draper III dissents. He would find the trial court abused its discretion in failing to admit the excluded evidence, which prevented the employee from fully developing and presenting his negligence case to the jury.

Facts: While working at a BNSF Railway Company service facility in Kansas, Rafael Lozano was to inspect locomotives to ensure they were ready to return to service. To ensure a locomotive was "lead qualified" (ready to take the lead position in a train and be staffed by a train crew), Lozano was required to inspect for and remedy potential hazards or defects identified on the "lead qualified" checklist, including identifying and removing any loose articles in the locomotive cab that could interfere with the engineer's duties or cause injury in the event of a collision. Among the items Lozano frequently had to move were ETDs left in locomotive cabs. It is undisputed that ETDs do not belong in locomotive cabs and that locomotives cannot be lead qualified unless and until ETDs are removed from the cabs. Despite having removed ETDs nearly 2,900 times in his career, Lozano admitted he never injured himself moving an ETD from a locomotive cab before, and there was no evidence that any employee ever had been injured in doing so. In May 2007, Lozano discovered two ETDs wedged behind a refrigerator in a locomotive cab. To remove them, he bent awkwardly over the refrigerator and lifted them

using only his arms and back, causing a sharp pain in his groin that subsided after a few minutes. Lozano finished his shift and did not report the injury or seek medical care for it then. Some time later, while attempting to disconnect a snow plow on a locomotive, he felt worse pain in his groin. He later saw a doctor and, in June 2007, had surgery to repair a hernia. Lozano sued BNSF for negligence under the federal employers' liability act for damages relating to his injury. At trial, he sought to introduce evidence to show that ETDs should not be stored in a locomotive's cab because they can be stored more safely in the locomotive's compressor compartment and that ETDs in a locomotive cab cause a tripping or other hazard to train crews. He also argued he and other employee witnesses should have been allowed to offer expert opinions about these issues. The trial court sustained BNSF's objections to such evidence, and Lozano made an offer of proof detailing the testimony he and other witnesses would give to establish these facts. Following a jury verdict in its favor, BNSF was awarded judgment. Lozano appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not abuse its discretion in excluding Lozano's proffered evidence. Such evidence was not relevant to Lozano's claim that BNSF failed to provide safe work methods or conditions for moving the ETDs and would have risked confusing the jury about an irrelevant matter.

(a) The excluded evidence that unused ETDs should be stored in a locomotive's compressor room and not in its cab does not purport to demonstrate that any safe alternative method of moving the ETDs was possible. Instead, it shows only that ETDs should not be stored in locomotive cabs – a fact not in dispute. BNSF did not allow ETDs in locomotive cabs, and it was Lozano's job to move any he found there. More importantly, Lozano did not claim BNSF was negligent for storing ETDs in locomotive cabs, and he cannot argue now that his evidence should have been admitted on that basis. It was the method BNSF required Lozano to use in moving the ETDs – not their proper destination – that Lozano claims rendered BNSF negligent.

(b) The excluded evidence that storing ETDs in locomotive cabs is hazardous tended to explain only why BNSF did not allow ETDs in locomotive cabs and why it required Lozano to remove them, not whether BNSF was negligent for failing to provide him with safe methods and safe conditions for moving the ETDs.

(c) Because the excluded evidence was not relevant to Lozano's claims against BNSF, it does not matter whether that evidence consisted of testimony about facts or expert opinions. As such, this Court does not reach the question of whether evidence regarding an alternative storage location for ETDs and the reasons why ETDs should not be stored in locomotive cabs were proper subjects for expert testimony. The Court also does not reach the question of whether Lozano or his co-workers were qualified by way of their experience or expertise to opine about such issues.

(2) Even had the excluded evidence been relevant to some other disputed issue – which it was not – its exclusion would have been harmless error and not sufficiently prejudicial to merit reversal. Lozano was unable to recall exactly when the alleged injury in moving the ETDs

occurred, and he admits he later was injured attempting to adjust a snow plow before he ever reported the alleged ETD injury or sought treatment for it. Even had he persuaded the jury that his hernia was caused, at least in part, by attempting to move the ETDs, the excluded evidence would not have changed the jury's verdict. As explained above, there is no connection whatsoever between the excluded evidence and the theories of unsafe work conditions and unsafe work methods that Lozano pleaded and tried to the jury.

Dissenting opinion by Judge Draper: The author would find the trial court abused its discretion in failing to admit the excluded evidence and, therefore, would reverse its judgment and remand (send back) the case. For Lozano to make a submissible case under the federal employers' liability act regarding an unsafe work condition, he had to demonstrate that BNSF had a duty to provide a reasonably safe work place; that BNSF's lack of care played a part, however slight, in producing his injury; and that his injury was foreseeable. The excluded evidence would have demonstrated that there was an alternative location within the locomotive for the ETDs and that, had BNSF required the ETDs to be placed in this alternative location, Lozano would not have had to lift the ETDs from the cab nose and other potential workplace injuries from tripping could have been prevented. Excluding this evidence prevented Lozano from fully developing and presenting his case to the jury.