

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

THOMAS HOST

RESPONDENT,

**v.
BNSF RAILWAY COMPANY**

APPELLANT.

DOCKET NUMBER WD76934

DATE: May 5, 2015

Appeal From:

Cass County Circuit Court
The Honorable William B. Collins, Judge

Appellate Judges:

Division Two: Lisa White Hardwick, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

Attorneys:

Nelson G. Wolff, St. Louis, MO, for respondent.

Sean P. Hamer and Michael A. Preston, Overland Park, KS and Marianne M. Auld, Fort Worth, TX, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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RESPONDENT,

v.

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No. WD76934

Cass County

Before Division Two: Lisa White Hardwick, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

BNSF Railway Company appeals from the entry of judgment in favor of Thomas Host following a jury trial on Host's claim for damages under the Federal Employers' Liability Act using theories of general negligence and negligence *per se*. BNSF claims several errors on appeal involving the admission of evidence, the submission of Host's claims to the jury, and jury instructions, any one of which BNSF contends warrants a new trial.

AFFIRM.

Division Two holds:

(1) When a claim for general negligence and a claim for negligence *per se* seek a single claim for damages under the FELA, the jury may receive separate instruction packages, but the case should be submitted to the jury in a single verdict form to avoid overlapping verdicts for the same injury. Here, any error resulting from the jury's award of overlapping verdicts was cured by the trial court's entry of judgment on only the higher of the two verdicts, the negligence *per se* verdict, as to which contributory negligence was not an available defense as a matter of law.

(2) To determine whether a locomotive is "in use" pursuant to the Locomotive Inspection Act, the court considers the totality of the circumstances at the time of the injury. Here, the totality of the circumstances supports the trial court's determination that the locomotive was "in use." The locomotive had been released from the repair facility and was being moved into the yard to be coupled with other train cars. At the time of Host's injury, Host was preparing to visually inspect the coupling of the locomotive with other train cars.

(3) Under the FELA, a railroad is liable for an injury or death resulting in whole or in part from the negligence of the railroad or its employees. A railroad is liable under FELA if there is some evidence, even the slightest, to connect the injury of the plaintiff to some negligent act of the railroad. Some evidence supports the presence of either a slippery substance or the lack of yellow nonslip paint on the stairs where Host fell. As both conditions constitute a violation of the LIA, some evidence connects Host's fall and injuries to a negligent act of BNSF.

(4) Evidence that BNSF cleaned up oil spots near the site of Host's fall did not constitute inadmissible evidence of subsequent remedial measures to prove BNSF's negligence.

(5) A federal regulation may be offered as evidence of the standard of care owed by a party in a claim for negligence *per se*. Here, BNSF's violation of 49 C.F.R. section 229.119(c) formed the basis for Host's negligence *per se* theory so that the trial court did not err in allowing its admission. Though the trial court improperly admitted the entire regulation into evidence rather than simply subsection (c), the balance of the regulation plainly did not apply to Host's cause of action, and caused no risk of juror confusion.

Opinion by Cynthia L. Martin, Judge

May 5, 2015

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