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 Circuit Honorable Jack R. Grate Case No. 1016-CV05790

PLAINTIFF-APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

A substantial portion of BNSF's Statement of Facts is an argumentative review of Plaintiff's testimony and medical evidence presenting BNSF's view of the weight or credibility of Plaintiff's testimony as to how his injury occurred. However, no issue as to the weight of the evidence is presented by this appeal, and this discussion has very little if anything to do with the evidentiary issues that are presented. Much of the evidence reviewed in this discussion is never alluded to again in BNSF's argument in its Brief.

ARGUMENT

I. Standard of Review

BNSF emphasizes the abuse of discretion standard but ignores the case law cited in Plaintiff's Substitute Brief ("Plaintiff's Brief") that establishes a trial court can abuse its discretion in admitting or excluding evidence by applying an incorrect legal standard, and that whether the trial court applied an incorrect legal standard is subject to *de novo* review. *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). The court of appeals recently applied this *de novo* standard in reversing a judgment due to exclusion of evidence.

> A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. . . . . However, the issue of whether the trial court applied the correct legal standard is a question of law that we review de novo.

Emerson v. The Garvin Group, LLC, 399 S.W.3d 42, 2013 WL 1739723 at *1 (Mo.App.E.D. 2013) (footnote and citations omitted).

The standard cited by Plaintiff that erroneous exclusion of evidence is presumed prejudicial unless otherwise shown was based on decisions of this Court specifically discussing this point that have not been overruled.[1] Other than to claim this is "inconsistent with a long line of precedent" from this Court,[2] precedent which is not indentified, BNSF has offered no reason why the cases cited by Plaintiff are not applicable to the standard of review in this appeal.

II. The trial court erred in excluding the proffered evidence of the compressor compartment as an alternative location for ETDs

A. BNSF's procedural objections are without merit

Plaintiff argues under Point I of his Brief that the trial court erred in excluding Plaintiff's proffered evidence of the locomotive compressor compartment as an alternative location for ETD's placed on locomotives coming into the DSF, rather than the locomotive cab, because this evidence was relevant to his theory of negligence that the ETD's should not have been placed in the cab at all because it made it more probable that BNSF failed to use ordinary care and was negligent than it would be without the evidence. This evidence goes to whether BNSF failed to use due care and was negligent in failing to provide reasonably safe methods and conditions for work due to the presence of ETDs in the cabs.

[1] *See* discussion and cases in Plaintiff's Brief at 23.

[2] BNSF Brief at 10.

BNSF argues this Court should not consider the merits of Plaintiff's argument that the excluded evidence went to whether BNSF provided reasonably safe conditions for work. First, BNSF argues this argument was not included in Plaintiff's motion for new trial.[3] Second, BNSF claims this argument was not properly presented in the court of appeals based on the language of the point relied on in Plaintiff's Brief in the court of appeals (Plaintiff's COA Brief").[4] BNSF substantially adopts the reasoning of the court of appeals Memorandum Supplementing Order Affirming Judgment ("Memorandum"),[5] which declined to consider the merits of this argument because the phrase "unsafe condition" was not included in Point Relied On I. BNSF argues that if this argument could not be considered by the court of appeals based on this claimed defect in Plaintiff's point relied on, it may not be considered by this Court either under Rule 83.08(b). BNSF's arguments are without merit.

Plaintiff's Motion for New Trial

Plaintiff's argument – that the excluded evidence of the compressor compartment as an alternative location for ETDs was relevant to whether BNSF provided safe

[3] The Motion for New Trial is in the Appendix to this Reply Brief (Reply App. A1-A17; LF 102-118).

[4] Plaintiff's amended COA Brief is in BNSF's Appendix in this Court (BNSF App. A1-A58).

[5] The Memorandum is in BNSF's Appendix (BNSF App. A61-A86).

conditions for work, as well as safe methods - was set forth in Plaintiff's Motion for New Trial, which stated in part:

> 3. The Court erred in excluding competent, relevant, and material evidence of alternative methods offered by plaintiff.… Per Jury Instruction number 6, Defendant was liable if the jury were to find that Defendant failed to provide, *inter alia*, reasonably safe *conditions for work*, or reasonably safe methods of work. *One of Plaintiff's contentions was that the end of train devices he was removing when injured should not have been in the cab of the locomotive to begin with.* Their presence in the cab constituted an unsafe condition for work in that they were behind the refrigerator, and an unsafe method of work and that they simply should not have been in the cab.…
>
> *Defendant's duty to provide Plaintiff with reasonably safe conditions for work required that defendant "' eliminate those dangers that could be removed by the exercise of reasonable care…'"… The danger involved herein is the presence of the end of train devices in the locomotive.* Per the aforecited, *Defendant owed Plaintiff the duty to eliminate the danger posed by the devices in the cab if it could be accomplished by the exercise of reasonable care. Evidence of the alternative, safe method of placing the devices in the compressor room of the locomotive was relevant in this regard as well, establishing that Defendant could have, by the exercise of*

reasonable care, eliminated the danger posed by the presence of the end-of-train devices in the locomotive.

(Reply App. A1-A3; LF 102-104) (emphasis supplied).

The trial court understood Plaintiff was arguing his proffered evidence went to the issue of safe working conditions. In the Order Denying Plaintiff's Motion for New Trial,[6] the trial court stated that:

> Plaintiffs argue that the issue of alternative methods of storage of the ETD's is relevant to whether the Defendant provided reasonably safe working conditions, which is an element of their claim.

(Reply App. A-18; LF 190).

The Motion for New Trial included the argument the excluded evidence went to BNSF's negligence in failing to provide reasonably safe conditions for work. BNSF's argument to the contrary is inaccurate at best, and is patently without merit.

BNSF's argument based on the Point Relied On in Plaintiff's COA Brief

The court of appeals refused to consider Plaintiff's argument that his proffered evidence of the compressor compartment as an alternative location for ETDs was relevant to his claim of negligence in failure to furnish reasonably safe conditions for work on the stated ground that Point Relied On I did not contain the words "unsafe condition."[7] BNSF

[6] Included in the Appendix to this Reply Brief (Reply App. A18-A21; LF 190-193).

[7] The first Point Relied On in Plaintiff's COA Brief appears in BNSF's Appendix at BNSF App. A18, A23-A24. It stated in relevant part (italics supplied):

did not argue that Plaintiff's COA Point Relied On I was defective in BNSF's Brief in the court of appeals ("BNSF COA Brief").[8] BNSF instead responded on the merits to Plaintiff's argument. Nevertheless, BNSF now adopts the Memorandum on this point and asks this Court to likewise refuse to consider Plaintiff's argument. BNSF's argument is without merit.

A reviewing court considers "all arguments" that are "fairly encompassed" by the point relied on. *66, Inc., v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 584 (Mo.App.E.D. 2003). Rule 84.04 (d) provides the points relied on, and particularly

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> The Trial Court erred in sustaining Respondent's motion in limine, sustaining Respondent's objection to Appellant's offer of proof and excluding competent, relevant and material *evidence of alternative methods of storage* offered by Appellant <u>because</u> the law is clear that the question of alternative methods are facts to be considered by the jury in Missouri Federal Employers' Liability Act (hereinafter "FELA") cases such as this in determining whether or not the method used by Respondent was reasonably safe and whether or not other methods could have been easily adopted and should have been admitted into evidence, *<u>in that</u> one of Appellant's contentions was that the end-of-train devices he was removing when injured should not have been in the cab of the locomotive to begin with, but should have been stored in the compressor room, ...*

[8] Included in the Appendix to this Reply Brief (Reply App. A22-A75).

the statement of the legal reasons for the claim of error within the point, to be concise. Rule 84.04 (d) (1) (B)[9]; *Estate of Dean v. Morris*, 963 S.W.2d 461, 466 (Mo.App.W.D. 1998). The point relied on should not contain arguments; the arguments should be "reserved for the argument portion of the brief." *Id.* at 466, n. 4.

Plaintiff's argument the excluded evidence went to whether BNSF was negligent in failing to provide safe methods and *conditions* for work was fairly encompassed within Point Relied On I in his COA Brief. Point I specifically stated his proffered evidence was related to his contention "that the end-of train devices he was removing when injured should not have been in the cab of the locomotive to begin with but should have been stored in the compressor room." Plaintiff's COA Brief at 18, 23 (BNSF App. A18, A23).

In the argument under Point I, Plaintiff repeatedly stated the presence of ETDs in the cab "constituted an unsafe *condition* for work" and an unsafe method of work.[10] This

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[9] Rule 84.04 (d) (1) (B) provides the point relied on should "state concisely the legal reasons for the appellant's claim of reversible error."

[10] The first two sentences of the Argument stated: " The trial court erred in excluding . . . evidence of alternative methods offered by Appellant because one of Appellant's contentions was the ETDs he was removing when injured should not have been in the cab of the locomotive to begin with. That is, *their mere presence in the cab constituted an unsafe condition for work,* and an unsafe method or work . . . ." Plaintiff's COA Brief at 24 (footnote omitted) (BNSF App. A24). Similar language is repeated at p. 25-26 (BNSF App. A25-A26).

argument was "fairly encompassed" within the statement in the Point Relied On that evidence of the alternative of placing ETDs in the compressor compartment was relevant to his contention "that the end of train devices should not have been in the locomotive cab to begin with but should have been stored in the compressor room."

As he did in his Motion for New Trial, Plaintiff argued in his COA Brief that:

> Respondent's duty to provide Appellant with reasonably safe conditions for work required that Respondent "'eliminate those dangers that could be removed by the exercise of reasonable care. . . '" (citation omitted). *Roth v. Atchison, Topeka And Santa Fe Railway Company*, 912 S.W.2d 583, 588 (Mo.App. W.D. 1996). The danger involved herein is the presence of the end-of-train devices in the locomotive cab. Per the aforecited, Respondent owed Appellant the duty to eliminate the danger posed by the devices in the cab if it could be accomplished by the exercise of reasonable care. Evidence of the alternative, safe method of placing the devices in the compressor room of the locomotive was relevant in this regard as well, establishing that Respondent could have, by the exercise of reasonable care, eliminated the danger posed by the presence of the end-of-train devices in the locomotive cab.

Plaintiff's COA Brief at 27 (BNSF App. A27).

BNSF's COA Brief shows BNSF understood Point Relied On I included the argument that the excluded evidence that the EDTs could have been stored in a location other than the locomotive cab and "should not have been in the cab to begin with" went

to an unsafe "condition" and responded to that argument on its merits (BNSF COA Brief at 11-12; Reply App. A38-A39). Indeed BNSF asserted that Plaintiff's argument "misunderstands the concept of 'work method' as it was used in the authorities Lozano cites," and argued that "what Plaintiff attempts to characterize as a 'method' is really a condition." BNSF COA Brief at 11 (Reply App. A38). BNSF argued evidence of an alternative method of lifting the EDTs from behind the cooler would qualify as alternative method evidence, but that evidence of an alternative method of storing ETDs left on the locomotives in the compressor compartment rather than the cab would not. BNSF COA Brief at 12-13 (Reply App. 39-40). BNSF understood that Plaintiff's argument that the alternative "method" of placing ETDs in the compressor compartment went at least in part to whether BNSF provided reasonably safe conditions for work based on Plaintiff's contention that the ETDs should not have been in the cab in the first place. BNSF argued that Plaintiff conflated the concepts of "method" and "condition" (BNSF COA Brief at 12; Reply App. A41) - and responded to Plaintiff's argument on the merits.

In its COA Brief, BNSF never argued that Plaintiff's argument that the excluded evidence went to the issue of safe conditions for work was not fairly encompassed in Plaintiff's Point Relied On. That position was first advanced by the Memorandum, and is asserted by BNSF for the first time in its Brief in this Court. Because BNSF did not raise this argument in its COA Brief, Plaintiff did not fairly have the opportunity to respond to it in his Reply Brief in the court of appeals.

The Memorandum erroneously construed Point I too narrowly, and for that reason improperly refused to consider Plaintiff's argument that the excluded evidence of an

alternative method of storage of ETDs in the compressor compartment also went to his allegation that BSNF failed to provide reasonably safe conditions for work. It is evident Plaintiff intended Point I to include the argument that the excluded evidence went to "unsafe conditions" as well as "alternative methods." The Memorandum explicitly stated this argument was not considered only because Point I contained the words "alternative methods of storage" but did not include the words "unsafe condition." Memorandum at 8 (BNSF App. A68).[11] The Memorandum instead focused on whether Plaintiff's proffered evidence that the ETDs could have been stored in the compressor compartment showed there was an alternative method of *moving* ETDs that were left in the cab (rather than the

[11] The Memorandum shows the wording of the Point did not impede the court's understanding of Plaintiff's argument under Point I:

> We note that Lozano uses the terms "method" and "location" interchangeably and argues that an unsafe condition existed by the mere presence of the ETD in the locomotive. However, Lozano's first Point Relied On does not contain a claim that he was not allowed to present evidence of an unsafe location but only that evidence regarding alternative methods of storage of the ETDs was excluded. "Claims not presented in the point relied on are not preserved for review." . . . . Since the claim of an unsafe condition is not contained in the Point Relied On, we will address only the exclusion of the evidence of the alternative storage location.

Memorandum at p. 8 (BNSF App. A68) (citation and footnote omitted).

real basis of Plaintiff argument that the ETDs should not have been placed in the cab in the first instance). The Memorandum denied Point I in part on the view the proffered evidence did not show an alternative method of removing ETDs from the cab - an argument Plaintiff did not make in Point I or in the argument under Point I.

Because COA Point Relied On I fairly encompassed the argument made in Plaintiff's COA Brief and renewed in his Substitute Brief, that the excluded evidence was relevant to whether BNSF was negligent in failing to provide reasonably safe conditions for work, BNSF's argument based on Rule 83.08 (b) is without merit. *See also Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984) (appellants' arguments reviewed on the merits over respondents' objections asserting failure of point relied on to state wherein and why the trial court erred; the issues had been raised in courts below and were clearly reiterated in this Court).[12]

Even if it is assumed, only for purposes of argument, there was a technical defect in Point I in Plaintiff's COA Brief, this Court's decisions dealing with alleged technical issues in points relied on demonstrate that all of Plaintiff's arguments under Point I could and should have been considered. In *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo. banc 1997), the point relied on claimed error as to a ruling in *limine* but did not specifically claim error in the subsequent exclusion of the evidence at trial. This Court stated the

[12] *Zafft* distinguished cases in which the merits were not considered because the point relied on "wholly failed to identify the action of the trial court challenged on appeal." *Id.* at 243.

point was therefore technically defective. The challenge to the exclusion of the evidence at trial was presumably, as Plaintiff's argument here, set forth in the argument. This Court considered the claim the evidence was erroneously excluded at trial as properly preserved and before the Court, stating:

> However, this Court's policy is to decide a case on its merits rather than on technical deficiencies in the brief. Generally, we will not exercise discretion to disregard a defective point unless the deficiency impedes disposition on the merits. *Brown*, 856 S.W.2d at 53. A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal.

943 S.W.2d at 647.

The point relied on did not impede disposition on the merits. BNSF had sufficient notice of the substance of the argument and point of error, and responded on the merits. "Of key significance" is the fact that BNSF "had sufficient notice of the point and did respond." *Roth v. La Societe Anonyme Tubormeca France*, 120 S.W.3d 764, 771 (Mo. App.W.D. 2003). The court was able to "ascertain the issues being raised with some degree of certainty by considering the argument in conjunction with the point." *Id.* at 770-771. The Memorandum shows the court fully understood Plaintiff's argument with respect to "unsafe conditions." Under the standard set forth in *Wilkerson*, the court of appeals could and should have considered Plaintiff's full argument under Point I of his COA Brief.

The sharp distinction the Memorandum and BNSF seek to make between "methods" and "conditions" to limit consideration of Point I is artificial and without substance on the facts of this case. *Elliott v. St. Louis Southwestern Railway Co.*, 487 S.W.2d 7 (Mo. 1972), illustrates this point. In *Elliott*, this Court expressly held it was not error to admit evidence of an alternative "method of making the crossing reasonably safe," 487 S.W.2d at 15-16, in a FELA action alleging failure to "provide reasonably safe conditions for work." 487 S.W.2d at 13. In *Cleghorn v. Terminal Railroad Association*, 289 S.W.2d 13, 18 (Mo. 1956), this Court held that "*methods* of marking or illuminating a switchstand" could be properly considered in a case based on failure to furnish a reasonably safe place to work (emphasis supplied).

Rule 83.08(b) provides that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Plaintiff's argument was "fairly encompassed" by the point relied on in his COA Brief and accordingly should have been considered by the court of appeals, as well as under *Wilkerson*. As BNSF admits, this Court is not bound by the Memorandum. Nor is the Memorandum entitled to any deference since this Court decides the case "the same as on original appeal." Rule 83.09. If Plaintiff's argument could or should have been considered by the court of appeals, Plaintiff's presentation of his argument in his Substitute Brief "does not alter the basis" of the claims presented in the court of appeals brief, and is not contrary to Rule 83.08(b).

A review of cases applying Rule 83.08 (b) shows this Court has declined to consider arguments made in a substitute brief in only two kinds of cases. First are the cases in which the substitute brief claims trial court error in actions of the trial court that

were not made the basis of a claim of error at all in the court of appeals brief. *E.g.*, *Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002); *Linzenni v. Hoffman*, 937 S.W.2d 723,726-727 (Mo. banc 1997). *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009), is similar. In the court of appeals, the *amount* of attorney's fees awarded by the trial court was challenged as unreasonable. In its substitute brief, the appellant claimed it was error to award *any* fees at all arguing respondents were not prevailing parties, an argument that "appeared nowhere in the brief to the court of appeals." *Id.* at 656. Those cases have no application here because the action of the trial court claimed as error in the Substitute Brief is identical to that in Plaintiff's COA Brief, the exclusion of Plaintiff's proffered evidence of the compressor compartment as an alternative location for ETDs.

Second are cases in which the substitute brief makes a substantive claim that was not made at all in the court of appeals brief. *E.g., Blackenstock v. Kohn*, 994 S.W.2d 947 (Mo. banc 1999); *Lane v. Lensmeyer*, 158 S.W.3d 218, 228-230 (Mo. banc 2005). These cases have no application here. Plaintiff's argument that the exclusion of his proffered evidence went to the issue of failure to provide safe conditions was clearly made a basis for his claim of error in the body of his COA Brief. It was not raised for the first time in his Substitute Brief and did not alter Plaintiff's position as set forth in his COA Brief.

Plaintiff's research has not discovered any case in which this Court refused to consider an argument in a substitute brief when that argument was, as here, set forth in support of a claim of error in the argument in the court of appeals brief.

In *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. banc 1998), an appellant who initially chose to stand on her court of appeals brief was granted leave by this Court to file a substitute brief for the specific purpose of attempting to cure violations of Rule 84.04 in the court of appeals brief. That is inconsistent with the implicit assumption of BNSF's argument - that Rule 83.08(b) does not permit a substitute brief to cure claimed defects in the wording of the points relied on in the court of appeals brief.[13] This Court should consider the merits of all of Plaintiff's arguments concerning the exclusion of his proffered evidence.

B. The trial court erred in excluding Plaintiff's proffered evidence

Plaintiff's Brief (pp. 40-46) showed the reasoning of BNSF's Motion in Limine and the cases cited in its Motion and COA Brief did not support exclusion of evidence of the compressor compartment as an alternative location for ETDs. Contrary to BNSF's argument the record shows the trial court's stated reason for excluding Plaintiff's evidence on relevance grounds[14] was the reasoning and case law cited in BNSF's Motion

[13] In *Thummel v. King*, 570 S.W.2d 679, 690 (Mo. banc 1978), decided before the adoption of Rule 83.08(b) in 1993, this Court stated an additional brief could have been filed after transfer in which defects in the points relied on in the court of appeals brief "could have been cured."

[14] To the extent the trial court may have alluded to other reasons to exclude this evidence they are addressed in Point III of Plaintiff's Brief and Point IV of this Reply.

in Limine.[15] In its order denying the Motion for New Trial the trial court stated it "excluded all such testimony pursuant to its ruling on the Motion in Limine on the same topic, and after having considered the renewed argument of both parties." (Reply App. A19; LF 191). That order again adopted the reasoning and cases cited in the Motion in Limine, stating:

> Defendant cites case law for the proposition that the existence of some alternative, safer working condition (here, storing the ETD elsewhere) does not automatically render the chosen method unsafe for purposes of the FELA . . . . The Court agrees with Defendant that evidence of an alternative location for storing the ETDs does not render the selected location unsafe.

(Reply App. A19; LF 191). This refers to precisely the reasoning and case law cited in BNSF's Motion in Limine (LF 55). In all of this, the trial court applied an incorrect legal standard.

BNSF's claim that the cases cited in its Motion in Limine and COA Brief are "consistent" with the trial court's ruling is incorrect. With the sole exception of *Stillman v. Norfolk & Western Ry. Co.*, 811 F.2d 834 (4th Cir. 1987), which should not be followed

[15] In denying one offer of proof, the trial court stated: "The railroad has no duty to provide the world's safest environment, they just have to have it safe." (T. 218-219). That was the basis asserted by the Motion in Limine for excluding alternative method evidence (LF 55). In denying another, the trial court stated that "the earlier rulings limine" were reaffirmed (T. 375).

for the reasons explained at p. 40-42 of Plaintiff's Brief, none of these cases even discussed admissibility of evidence of alternatives, and in most of them evidence of alternatives was in fact admitted and considered, a result certainly inconsistent with the trial court's ruling here. Plaintiff's Brief at 42-45. Nor has BNSF refuted Plaintiff's argument that admissibility does not depend on the sufficiency or submissibility of the evidence. Plaintiff's Brief at pp. 45-46.

On appeal, BNSF also argues the "only relevant unsafe condition was the specific location behind the water cooler that required Lozano to lift the ETDs in an awkward position." BNSF Brief at 21. BNSF therefore argues the *only* relevant evidence of alternatives would be of a different way of performing the specific task of lifting ETDs from behind a cooler, BNSF Brief at 20-21, thereby alleviating the "risks inherent in the task he was performing when he was injured." BNSF Brief at 17. BNSF concedes that the alternative of placing ETDs in the compressor room rather than the cab would have "reduced the risks of tripping," Id. at 17, 23, as well the risks of "being burned in a fire, or hit by a flying object if the train derailed." *Id.* at 17. However, BNSF argues that reducing or eliminating these risks by means of this alternative location is "wholly irrelevant in a case where Lozano did not slip or trip . . ." *Id.* at 17, 23. BNSF thus concludes that evidence of the alternative of the compressor compartment, which would have reduced or eliminated these risks, is likewise irrelevant.

BNSF's argument is in direct conflict with federal substantive law under the FELA.

In a FELA case, jury must initially determine whether the railroad was negligent. If so, and that negligence "is shown to have 'played any part, even the slightest, in producing the injury,' . . . then the carrier is answerable in damages even if 'the extent of the [injury] or the manner in which is occurred' was not 'probable or foreseeable.'", *CSX Transportation, Inc. v. McBride*, __ U.S. __, 131 S.Ct. 2630, 2643 (2011) (citations omitted).

Negligence is based on failure "to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller v. Atlantic Coast Line R.Co.*, 318 U.S. 54, 67 (1943). *See McBride*, 131 S.Ct. at 2643.

The scope of the railroad's duty "is measured by what is reasonably foreseeable under the circumstances." *McBride*, 131 S.Ct. 2643, *quoting Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 117 (1963). "[T]he foreseeability requirement is satisfied if *some* injury, rather than plaintiff's *precise* injury, were reasonably foreseeable." *Keith v. Burlington Northern Railroad Company*, 889 S.W.2d 911, 916 (Mo.App. S.D. 1994) (emphasis added). See discussion at pp. 22-23 below.

The presence of ETDs in cabs coming into the DSF[16] presented a tripping hazard[17] to employees such as Plaintiff who had to work on the locomotives in the DSF (as well as

[16] The evidence did not identify the specific person who placed the ETDs involved in Plaintiff's injury in the cab, but was sufficient to conclude it was a BNSF operating department employee. Ted Turner, who had been BNSF's mechanical general foreman,

other risks of ETDS in cabs described in the testimony), and a thus a foreseeable risk of injury under the FELA under this test. Evidence of these tripping and other hazards showed some injury was foreseeable from putting ETDs in the cabs, regardless of whether it showed that Plaintiff's precise injury was reasonably foreseeable. Before his injury Plaintiff complained to BNSF about the ETDs in the cabs coming into the DSF.[18] *White v. St. Louis-San Francisco Ry. Co.*, 539 S.W.2d 565, 569 (Mo.App. 1976). Plaintiff proffered evidence to show the tripping hazard presented by ETDs placed in the cabs of locomotives coming into the DSF, evidence that was excluded by the trial court in its entirety. Plaintiff argues this was error as well.[19]

Plaintiff argued at trial that the risks of ETDs placed in cabs, including the tripping hazard, could be eliminated if the ETDs were instead placed in the compressor

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testified ETDs were removed from the back of the trains coming into the Argentine yard by BNSF carmen or transportation department employees, and that ETDs removed by operating department employees were then placed in the locomotives going into the DSF. That was a common occurrence. (T. 396-397).

[17] Mr. Schakel, BNSF's second shift general foreman, would have testified putting ETDs in cabs was against BNSF general rules that there was not supposed to be anything in the cab that would be a trip hazard. See discussion of the error in excluding this testimony at pp. 15-17 of Plaintiff's Brief.

[18] See p. 7 of Plaintiff's Brief.

[19] Point II of Plaintiff's Brief and Point III of this Reply.

compartment.[20] Evidence of this alternative thus made it more probable and tended to prove that BNSF did not use ordinary care and was negligent in failing to provide reasonably safe conditions for work, as well as reasonably safe methods of storing ETDs, and was relevant for that reason. BNSF has not refuted the extensive case law cited in Plaintiff's Brief that evidence of alternatives is relevant for this purpose and that what is reasonably safe cannot be determined in a factual vacuum without the consideration of possible alternatives. See Plaintiff's Brief at 32-37. The trial court's orders completely and erroneously precluded the jury from considering this alternative.

BNSF's reliance on *Ewing v. St. Louis S.W.Ry. Co.*, 772 S.W.2d 774 (Mo.App. E.D. 1989), is misplaced. As noted in Plaintiff's Brief, p. 46, n. 13, and by *Keith v. Burlington Northern Railroad Co.*, 889 S.W.2d 911 (Mo.App. S.D. 1995), *Ewing* "does not discuss the admissibility of evidence concerning alternative methods of work." *Id.* at 921. *Ewing* involved only the sufficiency of the evidence of causation. Unlike *Ewing*, Plaintiff complained to BNSF about the specific unsafe condition at issue, the presence of ETDs in the cabs, before his injury. And unlike *Ewing*, a jury could reasonably find that Plaintiff's injury resulted "in whole or in part from the negligence" of BNSF, 45 U.S.C. § 51, based on the presence of the ETDs in the cab.

[20] Contrary to BNSF's argument, the proffered evidence was not that ETDs should be placed on the floor of the compressor compartment it was that ETDs could be placed in the compressor compartment and secured by a rack.

Contrary to the unstated assumption of BNSF's relevance argument, which is based on the fact Plaintiff was not injured by tripping on an ETD, the Supreme Court has recently held the FELA does *not* require a showing of direct or common law proximate causation between the railroad's negligence and the injury. *CSX Transportation, Inc. v. McBride*, __ U.S. __, 131 S.Ct. 2630 (2011). If the railroad was negligent, and such negligence "played any part, even the slightest, in producing the injury," *Id.* at 2643, "the carrier is answerable in damages even if 'the extent of the [injury] or the manner in which it occurred' was not '[p]robable" or "foreseeable.'" *Id. quoting Gallick.* Plaintiff claimed negligence based on the presence of ETDs in the cabs. A jury could conclude that the presence of the ETDs in the cab played a part in producing the injury under the above test. The ETDs would not have been put behind the cooler in the cab if they had not been put in the cab in the first place. The placement of the ETDs behind the cooler was a direct outgrowth of the continued placement of ETDs in cabs coming into the DSF, despite Plaintiff's previous complaints to BNSF.[21] BNSF's argument that the placement of the ETDs behind the cooler was not probable or foreseeable does not preclude a finding of causation under the above test and does not render Plaintiff's proffered evidence irrelevant.

III. The trial court erred in excluding evidence of the tripping hazard presented by ETDs in cabs

[21] It was at best an improvised way to get the ETDs off the cab floor and secure them in the cab. Plaintiff's Brief at 60.

Under Point II, Plaintiff argues the excluded evidence of the tripping hazard presented by the presence of ETDs in locomotive cabs was relevant to foreseeability under the FELA, and thus to whether BNSF was negligent in failing to provide both safe methods and conditions for work. The Supreme Court has held that "foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 117 (1963). Foreseeability is directly related to whether the railroad was negligent, that is, whether it failed "to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances." *McBride*, 131 S.Ct. at 2643 (*quoting Gallick*). The railroad's duty "is measured by what is reasonably foreseeable under like circumstances." *Id.* Point Relied On II of Plaintiff's COA Brief, in referring to "foreseeability," thus "fairly encompassed" his argument under Point II that the excluded evidence of a tripping hazard was relevant to whether BNSF failed to use ordinary care and was negligent in failing "to provide a safe method of work by not ensuring that the devices, i.e., tripping hazards, were not in the locomotive cabs."[22] The *method* is said to be unsafe here because it did not eliminate the unsafe *condition* and foreseeable risks posed by the presence of ETDs in the cab. This same argument was explicitly made in the Motion for New Trial.[23]

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[22] Plaintiff's COA Brief at 34-35 (BNSF App. A34-35).

[23] The Motion for New Trial, p.7, stated the evidence was relevant to BNSF's negligence in "not ensuring that the devices, i.e., tripping hazards, were not in the locomotive cabs." (Reply App. A7; LF 108).

"[T]he foreseeability requirement is satisfied if *some* injury, rather than plaintiff's *precise* injury, were reasonably foreseeable." *Keith v. Burlington Northern Railroad Company,* 889 S.W.2d 911, 916 (Mo.App. S.D. 1994) (emphasis added). See also *Stewart v. Alton and Southern Railway Company,* 849 S.W.2d 119, 125 (Mo.App. E.D. 1993). Evidence of the tripping hazard was relevant under this standard for the reasons set forth in Plaintiff's Brief at pp. 53-64.[24]

Contrary to BNSF's argument and the trial court's order denying the Motion for New Trial, the fact the trial court gave MAI 24.01(A) rather than MAI 24.01(B) did not "effectively" remove "the issue of foreseeability from the jury's determination." BNSF Brief at 37-38, fn. 21 and accompanying text. That is because Plaintiff still had the burden of *persuasion* on whether BNSF failed to use ordinary care, and was negligent in failing to provide reasonably safe conditions for work or safe methods of work. Instruction No. 5 and Instruction No. 6 (LF 94-95; A3-A4). It was important for Plaintiff to show the *jury* the foreseeability of some harm in placing ETDs in cabs coming into the DSF to meet his burden to persuade the jury by a preponderance of the evidence that BNSF failed to use ordinary care. Plaintiff was not relieved his burden of persuasion because the trial court did not specifically instruct on foreseeability by giving MAI 24.01(B). The jury was not instructed that foreseeability was withdrawn as an issue

[24] BNSF's claim the tripping hazard was not within the scope of the pleadings was also addressed in Plaintiff's Brief, at pp. 58-59, fn. 18.

either. The exclusion of all evidence and argument of the tripping hazard presented by ETDs in the cab prejudiced Plaintiff in carrying his burden of persuasion.

IV. BNSF'S alternative arguments for exclusion of Plaintiff's proffered evidence are without merit

The majority of BNSF's argument under Point IV of its Brief (responding to Point III of Plaintiff's Brief) is devoted to issues that are not raised in Plaintiff's Substitute Brief. Plaintiff's Point III is addressed to the exclusion of the evidence as to the compressor compartment as an alternative location for ETDs and the tripping hazard presented by ETDs in cabs, and to the alternative reasons the trial court may have relied upon in excluding this evidence. Plaintiff stated this explicitly at p. 65 of his Brief. BNSF's extensive discussion of evidence - of medical causation, bio-mechanics, safe lifting techniques, projectile hazards presented by ETDs in cabs, and damage to electrical circuits or fire hazards presented by ETDs in cabs (including whether the testimony O'Neal and Summers would have given on these topics was "virtually identical" to Plaintiff's testimony), and whether testimony on those topics beyond that given by Plaintiff would have been of assistance to the jury - is addressed to issues that Plaintiff did not raise under Point III. Plaintiff specifically stated at page 65, fn. 20, that these matters were *not* included within Point III.[25]

[25] Plaintiff recognized in footnote 20 that the substance of the testimony O'Neal and Summers would have given on these subjects came in through Plaintiff's testimony.

BNSF repeats its relevance arguments as to the compressor compartment as an alternative location for ETDs and the tripping hazards presented by ETDs in the cab. Points I and II of Plaintiff's Brief and Points II and III of this Reply addressed why the trial court erred in excluding this proffered evidence on relevance grounds. Those arguments will not be repeated here. BNSF is wrong in its claim that Plaintiff suggests 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." BNSF Brief at 43. To the contrary, Plaintiff has shown the primary and decisive reason the trial court excluded this evidence was that it accepted BNSF's relevance arguments in its Second Motion in Limine.

In the face of BNSF's repetition of its relevance arguments and evident alacrity in attempting to refute claims Plaintiff is *not* making in his Substitute Brief, one might be distracted from BNSF's complete failure to respond to some of the arguments Plaintiff does make.

BNSF's argument the proffered evidence would not have assisted the jury, if examined closely, is little more than a restatement of its relevance arguments. If testimony is not relevant, it of course cannot assist the jury. But if, as Plaintiff contends, evidence of the compressor compartment as an alternative location for ETDs was relevant, then BNSF's claim that it would not have assisted the jury completely evaporates. Instead testimony that ETDs could have been placed in the compressor room and secured in a rack would not only have been helpful to the jury, but would have been

essential to the jury's understanding of the issues, whether viewed as expert or fact testimony. See Plaintiff's Brief at pp. 71-75.

Jurors are not clairvoyant. While an average juror might know a locomotive has a cab, the jury would not know a compressor compartment even existed, much less that ETDs could have been placed there rather than the cab unless the jury was given this information in the evidence presented at trial. The jury would simply have been completely unable to even know of the existence of this alternative, much less to consider it in resolving the issues, without the proffered but excluded testimony. The experience and knowledge of O'Neal, Summers and Plaintiff concerning locomotives was superior to that of the ordinary juror and the subject is not one of everyday experience.

BNSF's alternative argument this testimony was not admissible because it was speculative is without merit. *Malone v. Gardner*, 362 Mo. 569, 242 S.W.2d 516 [5] (banc 1951); *Scneder v. Wabash R. Co.*, 272 S.W.2d 198 [4, 5] (Mo. 1954). In these FELA cases, this Court affirmed admission of testimony of similarly experienced rail employees of alternative methods the railroad "could have" used to provide safe conditions for work that was remarkably like that excluded here. *Malone*, 362 Mo. at 579-80, 242 S.W.2d at 521 (testimony "steampipes could have been so arranged" to allow connection from floor level rather than elevated catwalks); *Scneder*, 272 S.W.2d at 204 (testimony that escape "openings could have easily been made" in roundhouse roof for steam engine safety valves to be tested inside).

The excluded testimony that ETDs could have been placed in the compressor compartment and a rack used to hold the ETDs would have included Exhibit 9, a

schematic of a SD 40-2 locomotive and its compartments. O'Neal offered undisputed testimony that the compressor compartment was used by BNSF to store tools on the locomotive (T. 208-210). He testified the railroad had in the past used the compressor compartment as a location for storing railroad property during shipment between terminals (T. 208-209). It was undisputed that BNSF used a rack to store ETDs located at the entrance to the DSF (T. 395-396). A photo of the rack was an exhibit at trial, Exhibit 263A. The photo makes it apparent a rack with a means to secure ETDs could easily be constructed. BNSF knew how to secure devices in a locomotive so that they and their contents would not move around when it was in motion. BNSF bolted them to the floor. O'Neal and Plaintiff both testified, for instance, that the cooler in the cab was secured by bolting it to the floor (T 213-215; 264). O'Neal, as well as Summers and Plaintiff, each had many years of experience with locomotives at the Argentine facility. The proffered testimony was supported by facts well within their experience and knowledge: the space available within the compressor compartment, the use of the compressor compartment to store tools and shipped items, the undisputed use of a rack to store ETDs in the DSF, and the established method of bolting devices to the floor of locomotives. The proffered testimony was not speculative.

With respect to testimony that ETDs placed in locomotive cabs present a tripping hazard, if, as Plaintiff argues, this evidence was relevant, BNSF's argument in Point IV of its Brief offers no reason why the excluded testimony of O'Neal, Summers and Plaintiff would not have been admissible under *Patton v. May Department Stores Co.*, 762 S.W.2d 38 (Mo. banc 1988). See Plaintiff's Brief at 75-76.

CONCLUSION

For the reasons set forth above, and in Plaintiff's Substitute Brief, Plaintiff respectfully requests the Court to reverse the judgment of the trial court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Substitute Reply Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b). This Substitute Reply Brief was prepared using Microsoft Word 2007, in Times New Roman, 13 point font. Excluding the cover page, the signature block, this Certificate of Compliance and the Certificate of Service, it contains 7748 words according the word count provided by Microsoft Word 2007, which does not exceed the word count allowed by Rule 84.06 (b).

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CERTIFICATE OF SERVICE

Pursuant to Rule 103.08, I hereby certify that on July 8, 2013, I electronically filed the foregoing Substitute Reply Brief and the Appendix to this Substitute Reply Brief with the Clerk of the Court using the Missouri e-Filing system which will give notice of such filing to all parties.

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