IN THE SUPREME COURT OF MISSOURI

No. SC 91617

EDDIE CLUCK,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF OF APPELLANT

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Jurisdiction

Appellant, Eddie Cluck, (hereinafter referred to as "Plaintiff") filed suit against Respondent, Union Pacific (hereinafter referred to as "Defendant") pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, in the Circuit Court of Jackson County, Missouri. Legal File, pp. 12-14 (vol. I). The trial court entered judgment for Defendant on November 17, 2008. Plaintiff filed a timely post-trial motion on December 17, 2008 which the trial court denied on March 11, 2009. *Id.*, pp. 935, 941-942 (vol. VI). Plaintiff filed a timely notice of appeal on March 19, 2009. *Id.*, p. 937. The Court of Appeals issued its decision reversing the judgment of the circuit court and remanding for a new trial on January 11, 2011. The Court of Appeals issued a modified opinion on March 1, 2011. Plaintiff filed a timely motion to modify the modified opinion on March 16, 2011, which the Court of Appeals denied on March 29, 2011. On March 16, 2011, plaintiff also filed a timely application to transfer which the Court of Appeals similarly denied on March 29, 2011. Plaintiff filed a timely application for transfer to this Court pursuant to Rule 83.04 on April 12, 2011. This Court sustained the applications of both Respondent and Appellant and ordered the cause transferred on May 31, 2011. This Court therefore has jurisdiction over this cause pursuant to Rule 83.04.

Statement of Facts

A. Testimony

Plaintiff sustained a gunshot wound to his knee while he, Larry Clark and

their fellow employees were unloading luggage from a van provided by Defendant. Tr. 448-449 (vol. 1). Clark had forgotten that he had left a loaded pistol with the safety set to "off" in his luggage, and thus did not warn Plaintiff about the pistol. Tr. 447-448, Legal File, pp. 732-733, 738 (vol. V).

Clark did not intentionally harm Plaintiff. Tr. 743 (vol. II), Legal File, p. 735. Clark placed the gun in his grip a week or two before the incident. Legal File p. 737. Plaintiff testified that if he had known there was a loaded weapon inside Clark's grip, he would not have handled Clark's luggage. Tr. 459 (vol. I).

Plaintiff, Clark and their co-workers testified they were "on duty" while they were unloading the luggage. Tr. 446-448 (vol. I), Legal File, pp. 732, 797 (vol. V). The van had just arrived at a hotel in Coffeyville, Kansas, where the Union Pacific employees were going to be spending the night, after the crew had "deadheaded" from Van Buren, Arkansas. *Id.* The luggage was being unloaded so that the crew could enter lodging paid for by the railroad and prepare for further work activity the next day. *Id.* Clark was terminated for his conduct. Tr. 728 (vol. II). However, Defendant allowed him to return to work after five months on a "leniency," because everyone agreed what had happened was an accident. Tr. 742-743.

Danny Thomas, who was a member of that same crew, was also found to have brought a gun on the same trip. Tr. 452-453 (vol. I), Legal File p. 797 (vol. V). Plaintiff testified he had seen at least one of Defendant's managers, who was not a railroad police officer, with a gun while at work. Tr. 463-464.

Defendant introduced evidence over Plaintiff's objection that Plaintiff would not accept any position that netted him less than $2,350.00 per month. Tr. 599-605 (vol. I).

1. Admissions

Defendant's corporate representative, Randy Eardensohn, admitted that the accident was caused by Clark's being "careless." Tr. 743 (vol. II). At the time of the accident in 2004, he was the railroad's Manager of Operating Practices ("MOP") at Van Buren, Arkansas. Tr. 711 (Vol. II). His duties included supervising locomotive engineers between Van Buren, Arkansas and Coffeyville, Kansas. Tr. 712 (Vol. II). Eardensohn was plaintiff Cluck's supervisor at the time of the accident, *id.,* and in January of 2004, was "responsible for Mr. Cluck." Tr. 717 (Vol. II) Eardensohn also supervised Larry Clark "[b]ecause he's an engineer assigned to me between Van Buren and Coffeyville." Tr. 719 (Vol. II)

Eardensohn explained that the reason that plaintiff Cluck would go back and forth to work between Van Buren, Arkansas and Coffeyville, Kansas was because as

> trains move across the country, about every 150 to 200 miles on average they change crews. So they have different engineers as it progresses across the country. And one segment of that would be like Van Buren to Coffeyville. And then we would change crews there and another crew would take it from Coffeyville to Kansas City and so on.

Tr. 714-715 (Vol. II)

Eardensohn explained that Cluck's crew was deadheading from Van Buren to Coffeyville because "there's like an imbalance of crews. If you take a train to and away from home point, you got to have one to bring it back. And if there's an unequal amount going one direction or the other, we deadhead crews back and forth to kind of keep that balance." Tr. 715 (Vol. II).

Eardensohn admitted that Clark, by failing to warn Plaintiff he had placed a loaded gun with the safety set to "off" in his suitcase, violated the railroad's rules. Tr. 744-745, 752 (vol. II). Eardensohn admitted that Rule 1.12 forbade employees from bringing a gun onto Union Pacific property under "any circumstances." Tr. 722 (Vol, II) He admitted that there was no exception to Rule 1.12. *Id.*

Eardensohn stated the rules require the railroad employees to warn other employees about dangerous conditions, without exceptions. *Id.* at 752. Specifically, Eardenshohn admitted that Clark violated Rule 70.1 which requires employees to "take precaution to prevent injury to themselves, other employees, and the public." Tr. 744 (vol. II). Eardensohn admitted that Clark violated the Rule "on January 13, 2004" and he violated it while he was "at the hotel". Tr. 744 (Vol. II). Eardensohn admitted that there are no "exceptions to the railroad's rule requiring one employee to warn another employee about a dangerous condition". Tr. 752 (Vol. II).

Defense counsel admitted in opening statement that: 1. The co-employee, Clark, "threw a loaded gun in his grip without the safety on." (Tr. 190, Vol. I);

2. The grip is a duffel bag that is used to carry necessary items for work including "their rule books in there, sometimes their lanterns, their gloves, their vests, their ear protection, their eye protection. They put whatever in they're going to eat, their lunch, their dinner, whatever. Guys can put -- people can put all sorts of stuff in these grips. In this case, unbeknownst to anybody, he put a gun in his grip. Now he goes from Arkansas, to Coffeyville, Kansas." (Tr. 191-192, Vol. I);

3. The grip that Clark threw his gun into was "his bag that he takes on trips." (Tr. 190, Vol. I);

4. Clark and Cluck were transported from Arkansas to Kansas by the railroad in a crew van. "So sometime in Arkansas before he was transported, as the evidence will show, and they call them limousines, they're vans that the railroad employs companies to drive crews back and forth. And probably heard the term deadheading before where airplane pilots or crews sometimes fly somewhere to pick up a plane. Well, that's just what locomotive crews do. Sometimes they take them to another stop. In this particular case it was Coffeyville, Kansas." (Tr. 190, Vol. I);

5. When they arrived in Coffeyville, Kansas, "they are at the destination of where they're going to stay that night. There are four or five folks in this limo, including the driver. They get to the hotel or the motel in Kansas and they unload." (Tr. 192, Vol. I);

6. "And through no fault of Mr. Cluck's, none, nobody is saying anything

other than this was an accident that nobody knew was going to happen, including the guy that broke the rule by bringing a gun to work, so surprisingly, surprise to everybody when something occurred." (Tr. 192, Vol. 1);

7. "And the gun, when it went off, the bullet entered his leg." (Tr. 192, Vol. 1).

B. Rulings by the Trial Court

Plaintiff attempted to present deposition testimony from Lee Cole, one of Defendant's managers, that he was aware of other instances in which Defendant's employees had been disciplined for bringing weapons to work. Legal File pp. 139 (vol. I), 842 (vol. V). Defendant did not object to this testimony during the deposition. *Id.* However, the trial court sustained Defendant's objection at trial that this testimony was not limited to the time prior to Plaintiff's gunshot wound. Tr. 427-437. After Defendant elicited testimony from its corporate representative that he had not received any notice ***at any time*** that employees were bringing guns to work (*see* Tr. 720, 728-731 (vol. II)),

Plaintiff asked the trial court to reconsider its ruling pursuant to the doctrine of curative admissibility. Tr. 760-767. The trial court refused this request. *Id.*

Plaintiff moved for leave to amend at the close of the evidence, so that the pleadings would conform to evidence that had been offered at trial without objection. Tr. 834-840 (vol. II), Legal File pp. 589-595 (vol. IV). This motion was denied. Tr. 834-840.

Plaintiff and Defendant moved for directed verdicts at the close of the evidence. Tr. 692-706, 771-774, 832-833 (vol. II), Legal File pp. 575-588 (vol. IV). These motions were denied. Tr. 692-706, 771-774, 832-833 (vol. II).

1. Plaintiff's Tendered Instructions

Plaintiff tendered MAI 24.01(A) to submit his theory of *respondeat superior* liability based on Clark's negligence. The trial court refused that instruction and plaintiff tendered a series of MAI 24.01(A) instructions including the following, which the trial court also refused:

Plaintiff's Instruction No. 7D:

Your verdict must be for plaintiff if you believe:

First, defendant's employee failed to warn plaintiff that he had placed a loaded gun with the safety set to "off" in his luggage;

and

Second, defendant's employee was thereby negligent, and

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

Legal File, p. 697.

Plaintiff's Instruction 7E read:

Your verdict must be for plaintiff if you believe:

First, Larry Clark was acting within the scope and course of his employment by defendant Union Pacific railroad at the time of the gunshot incident;

Second, Larry Clark failed to warn plaintiff that he had placed a loaded

gun with the safety set to "off" in his luggage;

Third, Clark was thereby negligent, and

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

Appendix, A25, Legal File, p. 699.

Plaintiff's Instruction No. 7J read:

Your verdict must be for plaintiff if you believe:

First, Larry Clark failed to warn plaintiff of an unsafe condition; and

Second, Larry Clark was thereby negligent, and

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

Legal File, p. 697.

The trial court also refused this instruction. Tr. 776-779, 820-821 (vol. II).

Plaintiff submitted additional instructions that added a scope and course of employment element which the trial court also rejected. Legal File, pp. 699-704. Specifically, plaintiff tendered the following instructions:

Plaintiff's Instruction No. 7F:

Acts were within the scope and course of employment as that phrase is used in these instructions if:

1. They were done by Larry Clark partially to serve the business interests of defendant Union Pacific Railroad and partially to carry out the interests of Clark

2. Union Pacific Railroad's business created the necessity for the trip, and

3. Union Pacific Railroad either controlled or had the right to control the physical conduct of Clark.

Legal File p. 700 (vol. IV).

Plaintiff's Instruction No. 7H read:

Your verdict must be for plaintiff if you believe:

First, Larry Clark was preparing to enter a hotel within the course and scope of his employment by defendant Union Pacific Railroad; and

Second, Clark failed to warn plaintiff of an unsafe condition; and

Third, Clark was thereby negligent, and

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

Legal File p. 702 (vol. IV).

Plaintiff's Instruction No. 7I:

Preparing to enter a hotel is within the "scope and course of employment" as that phrase is used in these instructions if:

1. it was a part of the work Larry Clark was employed to perform, and

2. it was done by Larry Clark to serve the business interests of Union Pacific Railroad.

Legal File p. 703 (vol. IV).

The trial court refused each of these instructions. Tr. 781-791, 820-821 (vol. II).

The trial court did not submit to the jury an MAI 24.01(A) instruction. Tr. 774-808, 820-832. The only verdict director given by the trial court was MAI 24.01(B) that read as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, 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, and
>
> Second, with respect to such conditions for work, defendant failed to provide reasonably safe conditions for work, and
>
> Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and
>
> Fourth, such negligence resulted in whole or in part in injury to plaintiff.

Tr. 822-823, 858 (vol. II), Legal File p. 601 (vol. IV).

Plaintiff objected that while this instruction would be proper if his sole theory of liability was direct negligence, the submission of this instruction in place of any MAI 24.01(A) instruction erroneously granted Defendant a directed verdict on Plaintiff's attempt to impute liability to Defendant based on Clark's conduct. Tr. 830-831 (vol. II). Defendant also objected, stating that the only proper instruction in the case would be a MAI 24.01(A) instruction. Tr. 823-829.

During deliberations, the jury asked the trial court, "Can we know if E.C. has received disability pay while off work?" Tr. 906 (vol. II). During the trial, Defendant introduced evidence over Plaintiff's objection that Plaintiff would not accept any position that netted him less than $2,350.00 per month. Tr. 599-605 (vol. I). Plaintiff requested the trial court submit MAI 34.05, which would have instructed the jury not to consider any evidence of prior payments to or on behalf of Plaintiff. Tr. 906-909 (vol II). The trial court refused to give this instruction. Tr. 908-909.

The jury returned a verdict for Defendant. Tr. 909-912 (vol II). Following the trial court's entry of judgment, Plaintiff filed timely motions for new trial and for judgment notwithstanding the verdict, in which the arguments below were raised. Legal File pp. 621-869 (vols. IV & V); *see also id.* at 905-934 (vol. VI) (reply briefs). Following oral argument (Tr. 913-945 (vol. II), the trial court denied the motions. Legal File p. 935 (vol. VI). Plaintiff filed a timely notice of appeal. *Id.* at 937.

I. Opinions By The Court Of Appeals

The Court of Appeals original decision found that the following facts were "uncontroverted" (January 11, 2011 opinion at p. 9):

1. Clark had a loaded handgun in his bag while he was traveling for a work-related purpose;
2. Union Pacific has a Code of Operating Rules that prohibits employees from bringing guns to work;

3. The Code of Operating Rules requires Union Pacific employees to maintain safe conditions and to warn co-workers of any dangers.

Id.

The Court of Appeals concluded that "Clark's possession of a loaded gun in his traveling crew bag clearly constituted a violation of the employer's safety rules." *Id.* The Court of Appeals further found that "an employee's violation of safety rules establishes the foreseeability element as a matter of law." *Id.* The court concluded that "Cluck only had the burden to prove that Clark (and not necessarily Union Pacific) had knowledge of the unreasonably safe condition [citation], and, by virtue of violating a safety rule, Clark possessed such knowledge as a matter of law." *Id.* Accordingly, the court found that "MAI 24.01A - which took from the jury the question of knowledge of the unreasonably dangerous condition - should have been given." *Id.*

Although several of plaintiff's proposed verdict directors did not submit the act of bringing a loaded gun to work but rather the failure to warn of its presence, "Union Pacific disputed that Clark was performing a task in furtherance of his work by bringing a loaded gun to work...." January 11, 2011 opinion at p. 11.

The Court of Appeals agreed with Union Pacific that MAI 24.01A is insufficient for submitting co-employee negligence claims in this case because it failed to submit that Clark was acting in the course and scope of his employment at the time that he brought the gun to work. Despite having previously found that "Clark had a loaded handgun in his bag while he was traveling for a work-related

purpose" (January 11, 2011 opinion at p. 9), the Court of Appeals concluded that "the scope and course of employment is a disputed issue of fact" (January 11, 2011 opinion at p. 13) and accordingly, the verdict director must be modified "to read: defendant's employee was thereby negligent *while acting in the scope of employment.*" January 11, 2011 opinion at pp. 13-14 (italics by the court).

The Court explained that the jury "should be allowed to consider whether the employee's negligent act was committed in furtherance of the employer's business or 'entirely upon his own impulse, for his own amusement, and for now purpose or benefit to the defendant employer.'" January 11, 2011 opinion at p. 13, *quoting Copeland v. St. Louis-San Francisco Ry. Co.,* 291 F.2d 119,120 (10th Cir. 1961).

The Court of Appeals found that the instructional error was prejudicial and reversed. January 11, 2011 opinion at p. 14. The Court of Appeals' opinion had previously acknowledged that "[i]n this appeal, Cluck does not argue that the court erred *in instructing the jury on direct liability*, but contends that he was also entitled to have the jury consider his elected theory of imputed liablity." January 11, 2011 opinion at p. 9 (emphasis added). Although plaintiff had raised two distinct evidentiary errors as requiring reversal of the verdict on the direct liability claim, the Court of Appeals concluded that the reversal on the imputed liability claim "does not affect the jury verdict and judgment in favor of Union Pacific on the alternative theory of direct liability, which has not been challenged on appeal." *Id.* at pp. 14-15. The Court of Appeals expressly refused to consider those claims of evidentiary error. January 11, 2011 opinion at p. 16.

The Court of Appeals denied Cluck's point with regard to the trial court's refusing to direct a verdict on liability in plaintiff's favor. The Court concluded that Cluck was required to prove that "Clark was acting within the scope and course of his employment at the time the handgun discharged and caused injury." January 11, 2011 opinion at p. 15. The Court found that "[t]his factual issue was disputed by Union Pacific at trial." *Id.*

In so doing, the Court accepted Union Pacific's defense that "bringing a loaded gun to work was beyond the scope of Clark's employment and in no way furthered the railroad's business." *Id.* The Court did not attempt to reconcile its focus on "bringing a loaded gun to work" as the negligent act with plaintiff's claim that Clark failed to warn him of the presence of the gun while they were unloading luggage at the railroad's instance.

The Court of Appeals modified its opinion on March 1, 2011. The modified opinion reviewed Cluck's specific submitted instructions. March 1, 2011 opinion at p.15. The Court recognized that Cluck had submitted six separate verdict directors in an effort to satisfy the trial court. *Id.* at n. 5. The Court noted that instructions 7, 7A and 7C directed the jury to consider Clark's act of bringing the loaded gun to work. *Id.* The Court also noted that Cluck's instructions 7E and 7H "did not include any specific acts of negligence and merely instructed the jury to consider whether Clark was acting within the scope of his employment when the gunshot incident occurred."

Id. Although the Court of Appeals acknowledged Plaintiff's Instruction 7J

(March 1, 2011 opinion at p. 14), it did not expressly evaluate that instruction. *Id.* p. 14 and 15, n. 5.

Plaintiff filed a timely motion to modify the modified opinion on March 16, 2011, which the Court of Appeals denied on March 29, 2011. On March 16, 2011, plaintiff also filed a timely application to transfer which the Court of Appeals similarly denied on March 29, 2011. Plaintiff filed a timely application for transfer to this Court pursuant to Rule 83.04 on April 12, 2011. This Court sustained the applications of both Respondent and Appellant and ordered the cause transferred on May 31, 2011.

Points Relied On

I. The Trial Court Erred In Denying Plaintiff's Motion For A Directed Verdict On Liability Because There Was No Question Of Fact For The Jury To Decide In That The Evidence Was Undisputed And Defendant Admitted All Facts Necessary To Establish Each Element Of Plaintiff's Case Including The Course And Scope Of Employment

All American Painting, LLC v. Financial Solutions and Associates, Inc., 315 S.W.3d 719, 723 (Mo. banc 2010)

Bowers v. S-H-S Motor Sales Corp., 481 S.W.2d 584, (Mo.App.1972)

Johnson v. Union Pacific R. Co, 146 S.W.3d 14, 17 (Mo.App.2004)

Burrus v. Norfolk and W. Ry. Co., 977 S.W.2d 39, 44 (Mo.App. 1998)

I. Alternatively, The Trial Court Committed Prejudicial Error In Refusing To Submit Missouri Approved Instruction (MAI) 24.01(A), Plaintiff's

Instruction 7D or 7J or Alternatively Plaintiff's Instructions 7E or 7H and 7F or 7I Because Plaintiff Had A Right To Have The Jury Instructed On Any Theory Supported By The Evidence In That Substantial Evidence Supported Plaintiff's Theory Of *Respondeat Superior* Liability

Vandergriff v. Mo. Pac. R.R., 769 S.W.2d 99, 104 (Mo. banc 1989)

MAI 24.01A

Missouri Supreme Court Rule 70.02(b)

Missouri Supreme Court Rule 70.03

I. The Trial Court Erred Because It Refused Plaintiff's Request to Withdraw The Issue Of Prior Payments To The Plaintiff In That A False Issue Had Been Created By The Introduction Of Evidence That Plaintiff Would Refuse Work That Paid Less Than $2,350.00 Per Month

Eckerd v. Country Mut. Ins. Co., 289 S.W.3d 738, 747 (Mo.App. 2009)

MAI 34.05, Committee Comments

Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963)

Green v. Denver & Rio Grande W. R.R. Co., 59 F.3d 1029(10th Cir. 1995)

I. The Trial Court Erred In Barring Deposition Testimony From One Of Defendant's Managers That He Was Aware Of Reports Of Defendant's Employees Being Disciplined For Bringing Weapons To Work Because Defendant Had Waived Its Objection In That Defendant Had Failed To Object To The Testimony During The Deposition And Defendant Had Elicited Testimony That The Railroad Had No Knowledge That Any Of Its

Employees Had Brought Guns To Work Or That Any Disciplinary Action Had Been Taken Toward Any Employees For Such Conduct

Missouri Supreme Court Rule 57.07(b)(4)

Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. banc 1991)

Watson v. Landvatter, 517 S.W.2d 117 (Mo. banc 1974)

Alvey v. Sears, Roebuck and Co., 360 S.W.2d 231 (Mo. 1962)

ARGUMENT

I. The Trial Court Erred In Denying Plaintiff's Motion For A Directed Verdict On Liability Because There Was No Question Of Fact For The Jury To Decide In That The Evidence Was Undisputed And Defendant Admitted All Facts Necessary To Establish Each Element Of Plaintiff's Case Including The Course And Scope Of Employment

One of plaintiff's theories of liability was that the railroad was liable under the doctrine of *respondeat superior* for the negligence of its employee, Clark, in failing to warn plaintiff that the luggage contained a loaded gun with the safety "off." The trial court refused to recognize that Clark's failure to warn plaintiff Cluck was legally attributable to the railroad. If the trial court had so recognized the appropriate legal principle, it would have been required to grant plaintiff's motion for directed verdict because the required elements were established by undisputed evidence and were admitted by the railroad.

A. A Verdict Must Be Directed For The Plaintiff When The Defendant Has Admitted The Elements Of Plaintiff's Case

This Court has recently explained that a directed verdict should be entered in favor of the plaintiff in very limited circumstances. "Parties bearing the burden of proof generally are not entitled to a directed verdict. *Brandt v. Pelican*, 856 S.W.2d 658, 664 (Mo. banc 1993). However, the plaintiff is entitled to a directed verdict in the unusual situation where the defendant has admitted in its pleadings, by counsel, or through the defendant's individual testimony the basic facts of the plaintiff's case. *Id.* In such instances, the plaintiff is entitled to a directed verdict because there is no question of fact remaining for the jury to decide." *All American Painting, LLC v. Financial Solutions and Associates, Inc.,* 315 S.W.3d 719, 723 (Mo. banc 2010); *and see Stipp v. Meadows,* 996 S.W.2d 764, 765-766 (Mo.App.1999) (directed verdict for plaintiff proper when "'where defendant in his pleadings or by his counsel in open court admits, or by his own evidence establishes, plaintiff's claim or where there is no real dispute of the basic facts supported by uncontradicted testimony essential to the claim.'")

This is particularly true with the issue of agency. When "'the facts relied upon to establish its existence are undisputed, and conflicting inferences cannot be drawn from such facts, the question of the existence of the agency is one of law for the court.'" *Bowers v. S-H-S Motor Sales Corp.,* 481 S.W.2d 584, (Mo.App.1972) *quoting* 3 Am.Jur.2d Agency, Sec. 359, p. 717. The Court of Appeals also explained that MAI 18.01 does not require "'the submission of

agency to the jury merely because the existence of that relationship has been denied by pleaded allegation or by oral disclaimer when it is unaccompanied by any supporting facts to substantiate the denial." *Baker v. St Paul Fire & Marine Insurance Co.,* 427 S.W.2d 281, 293 (Mo.App.1968).

This rigorous standard was met in this case. The railroad's Manager of Operating Practices, Eardensohn, admitted that Cluck and Clark were deadheading in Coffeyville because the railroad's "imbalance of crews" required it. Tr. 715 (Vol. II). Eardensohn supervised both plaintiff Cluck and Clark. The railroad's MOP admitted that the accident was caused by Larry Clark being "careless." Tr. 743 (Vol. II). The railroad's MOP admitted that the railroad's rules required Clark to warn plaintiff of the loaded gun with the safety set to "off" and that by failing to do so, Clark had violated Rule 70.1. Tr. 744-745; 752 (Vol. II). The railroad's MOP admitted that there were no exceptions to the rule. Tr. 752 (Vol. II). The railroad's MOP further admitted that Clark violated Rule 70.1 "on January 13, 2004" while he was "at the hotel." Tr. 744 (Vol. II).

Eardensohn also admitted that Union Pacific's operating Rule 1.12 forbade employees from bringing guns onto Union Pacific property under any circumstances and that this rule likewise had no exceptions. Tr. 722 (Vol.II).

Moreover, defense counsel admitted the same elements in his opening statement. Defense counsel admitted that:

1. The co-employee, Clark, "threw a loaded gun in his grip without the safety on." (Tr. 190, Vol. I);

2. Clark and Cluck were transported from Arkansas to Kansas by the railroad in a crew van. "Well, that's just what locomotive crews do. Sometimes they take them to another stop. In this particular case it was Coffeyville, Kansas." (Tr. 190, Vol. I);

3. When Cluck and Clark arrived in Coffeyville, Kansas, "they are at the destination of where they're going to stay that night. There are four or five folks in this limo, including the driver. They get to the hotel or the motel in Kansas and they unload." (Tr. 192, Vol. I);

4. "And through no fault of Mr. Cluck's, none, nobody is saying anything other than this was an accident that nobody knew was going to happen, including the guy that broke the rule *by bringing a gun to work*, so surprisingly, surprise to everybody when something occurred." Tr. 192, (Vol. 1) (emphasis added);

5. "And the gun, when it went off, the bullet entered his leg." (Tr. 192, Vol. 1).

These admissions of counsel establish that the railroad's employee Clark was in Coffeyville, Kansas for the convenience of the railroad, that Clark brought "to work" a loaded gun without the safety on which violated an applicable work rule, the gun went off, and shot plaintiff in the leg and plaintiff was not guilty of contributory negligence.

To recover under the FELA, "the plaintiff must demonstrate that: 1) it was the railroad's duty to provide a reasonably safe workplace, 2) the railroad's lack of

care played a part, however small, in producing the injury and 3) the injury was reasonably foreseeable." *Johnson v. Union Pacific R. Co,* 146 S.W.3d 14, 17 (Mo.App.2004). These elements will be discussed below.

1. The Railroad Has A Statutory Duty To Provide A Reasonably Safe Place To Work

Because the railroad has a statutory duty to provide a reasonably safe place to work, the first element is met. "Applying the provisions of FELA, a railroad has the duty to provide a reasonably safe workplace. *Euton v. Norfolk & Western Ry. Co.*, 936 S.W.2d 146, 150 (Mo.App. E.D.1996). The duty to provide a 'reasonably safe workplace' means that the employer is required to remove those dangers that can be removed by the exercise of reasonable care." *Johnson, supra,* 146 S.W.3d at 17.

2. The Railroad's Lack Of Care Caused The Injury

The second element was met by the railroad's admissions, through its corporate representative Randy Eardensohn and its counsel at trial. The railroad admitted that the injury happened because Clark was "careless." Tr. 743 (Vol. II) The railroad admitted that plaintiff Cluck was injured when Clark's pistol discharged a bullet into the plaintiff's leg. Tr. 192 (Vol. I).

4. The Railroad's Own Rules Establish That The Injury Was Foreseeable

The third element, reasonable foreseeability, was met by railroad's admissions that it had rules that addressed Clark's conduct. An "injury to employees or to members of the public could reasonably be foreseen from the

violation of safety rules." *Burrus v. Norfolk and W. Ry. Co.*, 977 S.W.2d 39, 44 (Mo.App. 1998). The railroad admitted that its own rules required its employees to warn co-employees of dangerous conditions and forbade firearms on company property, that there were no exceptions to these rules and that the rules were violated by Clark's failure to warn plaintiff Cluck that he had placed a loaded pistol with the safety set to "off." Tr. 744-745, 752 (vol. II). These admissions establish the third element.

Because there was no factual dispute and because the railroad admitted the basic facts of the case, there was no question of fact for the jury to decide with regard to liability and plaintiff's motion for directed verdict should have been granted. *See All American Painting, supra,* 315 S.W.3d 719, 723.

The Court of Appeals correctly determined that "Cluck only had the burden to prove that Clark (and not necessarily Union Pacific) had knowledge of the unreasonably unsafe condition, [citation]; and, by virtue of violating a safety rule, Clark possessed such knowledge as a matter of law. [citation]." Modified Opinion at p. 10.

But the railroad argued that Clark was not within the course and scope of his employment at the time of the injury and that therefore an essential element of *respondeat superior* was lacking. The trial court agreed and held that without notice and an opportunity to correct Clark's negligent behavior, the railroad could not be held liable for Cluck's injuries. The Court of Appeals properly rejected this argument but concluded that where

recovery is sought on the sole theory of *respondeat superior*, the factfinder should be allowed to consider whether the employee's negligent act was committed in furtherance of the employer's business or "entirely upon his own impulse, for his own amusement, and for no purpose or benefit to the defendant employer.' *Copeland,* 291 F.2d at 120.

Modified Opinion at pp. 12-13.

The Court of Appeals failed to reconcile that decision with its own conclusion that there was no dispute about any of the relevant facts. *See Stipp v. Meadows, supra,* 996 S.W.2d 764, 765-766 (directed verdict required where there is no real dispute about the basic facts which are supported by uncontradicted testimony); *Cf. Baker v. St Paul Fire & Marine Insurance Co.,* 427 S.W.2d 281, 293, *supra* (question of agency is properly removed from jury when disputed only by pleading or argument). In the case at bar, the Court of Appeals correctly found that that "[t]he evidence at trial established that Clark had a loaded handgun in his bag while he was traveling for a work-related purpose." Modified Opinion at p. 9. That should have ended the inquiry and judgment should have been entered for the plaintiff because there was no dispute that Clark, like plaintiff Cluck, was traveling on the railroad's business, in a crew van selected and operated by the railroad, to a a motel chosen by the railroad for the convenience of the railroad. There was no dispute that Cluck and Clark were on duty. There was no dispute that unloading the van was a necessary incident of the trip to Coffeyville, Kansas. These facts were, as the Court of Appeals characterized them, "uncontroverted."

Modified Opinion at p. 9. Its determination that "course and scope" was a disputed element therefore fails.

Both plaintiff Cluck and co-worker Clark were within the scope of their employment as a matter of law. Because employers rarely, if ever, authorize their employees to act negligently, the course and scope of employment does not require that the negligent act be authorized by the employer but rather only the general activity within which the negligent act was performed. The Court of Appeals correctly held that the trial court had committed reversible error in refusing to submit to the jury any theory other than the railroad's direct negligence. The plain language of the FELA imposes liability on the employer for the negligence of its "officers, agents and fellow employees" and does not require notice and an opportunity to correct. 45 U.S.C. § 51; *and see Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330 (1958) ((under FELA, employer is liable to an employee not only for its own torts, but also the torts of the employee's fellow servants).

The issues of scope of employment and of imputed liability will be discussed below.

A. Plaintiff And Clark Were Within The Scope Of Employment As A Matter Of Law

This Court recently explained that "[a]n act that is fairly and naturally incident to the employer's business is not removed from the employer's business because it is mistakenly or ill-advisedly done, unless it arises from a wholly

external, independent or personal motive." *Southers v. City of Farmington,* 263 S.W.3d 603, 619 n22 (Mo.banc 2008). This Court re-iterated the caveat that "'[w]hether an employee is engaged in the scope and course of his employment is not measured by the time or motive of the conduct, but whether it was done by virtue of the employment and in furtherance of the business or "interests" of the employer.'" *Id., quoting Noah v. Ziehl,* 759 S.W.2d 905, 910 (Mo.App.1988).

At the time Plaintiff was injured, Clark was involved in the unloading of luggage from a van contracted for by the railroad so that the crew could enter lodging paid for by the railroad and prepare to engage in further work activity on behalf of the railroad on the next day. Defense counsel's opening statement admitted this. All witnesses, including the railroad's manager, agreed Clark was on duty at the time Plaintiff was injured. All witnesses, including the railroad's manager, agreed that Clark's forgetting to warn plaintiff of the weapon's presence violated a railroad operating rule. Defense counsel admitted this as well. There is therefore no basis to conclude that any of the individuals were other than in the course and scope of their employment and the trial court erred in denying plaintiff's motion for a directed verdict and judgment *n.o.v.*

1. Injuries Occurring During Transportation Or Lodging Are Within The Course and Scope of Employment

In this case, the plaintiff was injured while unloading Clark's luggage as part of a trip directed by the defendant railroad. The standard for course and scope of employment under the FELA does not differ in any meaningful way from the

standard applied by this Court in *Southers v. City of Farmington,* 263 S.W.3d 603, 619 n22, *supra*. An employee is within the course and scope of employment even when not actively engaged in operating trains. Numerous cases have held a railroad liable for injuries to its employees that arise during transport and/or lodging. See, e.g., *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966) (employer liable for cab driver's negligence resulting in employee's death) (Jones Act case); *Bailey v. Norfolk and W. Ry. Co*., 942 S.W.2d 404, 411-12 (Mo.App. E.D. 1997) (railroad liable for unsafe conditions in its sleeping facilities; "It was reasonably foreseeable that these working conditions would adversely affect periods of rest and sleep and could cause Bailey to suffer some kind of injury."); *Bond v. S. Ry. Co*., 762 F.2d 1005 (6th Cir. 1985) (because railroad's business required its employees to stay overnight away from home, and railroad contracted to provide travel service and accommodations to its employees, the contractor was performing operational activities of the railroad, and any negligence by it could be imputed to the railroad); *Keller v. St. Louis-S.W. Ry. Co*., 952 F.Supp. 711 (D. Kan. 1996) (railroad liable for acts of cab service for which it contracted, regardless of cab service's independent contractor status; transportation was operational activity of railroad, plaintiff was required to ride in the vehicle, and cab operated under contract in which it agreed to transport railroad's employees at railroad's direction); *Penn Central Corp. v. Checker Cab Co.,* 488 F.Supp. 1225 (E.D. Mich. 1980) ("Thus, it is clear that where a railroad utilizes cab services to transport its employees, these services can constitute an operational activity of the

railroad, thus rendering the railroad liable for injuries sustained by the employees in the course of the cab transportation."); *Leek v. Baltimore & Ohio R.R. Co*., 200 F.Supp. 368 (N.D. W. Va. 1962) (railroad liable for injuries sustained by employee in taxicab).

Several other cases have held that overnight lodging away from home constitutes an operational activity of the railroad. See *Armstrong v. Burlington N. R.R. Co.,* 139 F.3d 1277 (9th Cir. 1998) (plaintiff's injury occurred within the course of his employment where railroad provided and paid for the motel accommodations where assault occurred); *Empey v. Grand Trunk W. R.R. Co*., 869 F.2d 293 (6th Cir. 1989)("we join the Second and Third Circuits in holding that an employee who is injured while he avails himself of housing which his employer has provided and implicitly encouraged him to use is within the scope of his employment for the purposes of the FELA."); *Carney v. Pittsburgh & Lake Erie R.R. Co*., 316 F.2d 277 (3d Cir. 1963) (injured employee was in the scope of his employment when he fell from a negligently maintained bed at a YMCA, where railroad handled employee's board and lodging through the YMCA to make sure employee was on location and readily available); *Mostyn v. Delaware, L. & W.R. Co*., 160 F.2d 15 (2d Cir. 1947) (per Learned Hand, J.) (railroad liable for injuries sustained by employee who was sleeping outside because bunk cars were unfit for sleeping due to vermin; whenever railroad provides shelter or food or both to its employees so they can prepare themselves for their work or to rest and recuperate, they must be regarded as in the railroad's employ).

Finally, courts have held that a railroad employee is within the scope of his employment while he is retrieving his belongings. See *Lowden v. Atchison Topeka and Santa Fe Ry.*, 937 F.2d 491, 492-93 (9th Cir. 1991) (employee who had been suspended was arguably in scope of employment while retrieving his belongings before leaving work premises; it was arguably in furtherance of the railroad's business for employee to remove his effects so next employee could be housed in bunk car). In *Lowden*, the court noted the employee's presence was known to the railroad, and a jury could find it was requested or expected. *Id.* at 493. In the instant case, Plaintiff, Clark and the other employees' presence was not only known to the railroad, but it is undisputed their presence was ordered and expected by Defendant.

Even if not required, an act is within the scope of employment if it is "a necessary incident of his day's work." *Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R.R. Co.*, 841 F.2d 1347, 1355 (7th Cir. 1988), citing *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 173 (1917). *Wilson* held that under FELA, the fact finder must determine if "(a) the tort arose during an errand of the sort that probably would not have occurred absent the existence of the employment relationship, or (b) for some other reason, the probability of the tort was substantially increased by the existence of the employment relationship …" Id. at 1356 (citation omitted).

In the instant case, the tort could not "arise" until the gun discharged. That occurred during "an errand of the sort that probably would not have occurred absent the existence of the employment relationship" – Plaintiff was removing the

luggage of another railroad employee from a van paid for by the railroad, as he, Clark and his co-workers were preparing to spend the night in a hotel paid for by the railroad so they could perform tasks for the railroad near that location. Under these facts, it is also abundantly clear that "the probability of the tort was substantially increased by the existence of the employment relationship" – Plaintiff could not have been injured in this manner otherwise.

Even Clark's conduct at home was within the course and scope of his employment because packing his luggage so that he could perform work for Defendant overnight was in furtherance of the railroad's business. That he did so negligently (by packing items he should not have) does not insulate the railroad from liability, because the FELA has specifically barred the use of the fellow servant defense. See *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330 (1958) (under FELA, employer is liable not only for its own torts, but also the torts of a railroad worker's fellow servants). But examining Clark's actions at home is not necessary to resolve this case for the reasons explained in Section A, above.

B. Unloading Baggage And Not Putting A Loaded Pistol Into Luggage At Home Must Be Within The Course And Scope Of Employment

Can a bus company insulate itself from liability by ordering its drivers not to strike another vehicle? Can a hardware store escape liability by directing its employees to stack merchandise on shelves only in ways that do not allow the merchandise to fall and strike customers? Can a delivery service avoid *respondeat*

superior because its driver got drunk at home before getting behind the wheel of the delivery van and crashing into the family minivan? Of course not; just as those entities cannot escape liability for the negligence of their employees and agents, neither can the railroad.

For example, both MAI 18.01 and 37.05(1) require that the jury find that the employee was "operating the motor vehicle within the scope and course of employment", not that the employee "violated the traffic signal" within the scope and course. This is where the court of appeals went wrong. While the violation of the traffic signal is the act of negligence that the jury must find, it is not that specific act which the jury must find to be within the scope and course. It is the general activity, which the employee performed negligently, which must be within the scope and course.

To require the specific act of negligence to be within the scope and course would be a positive misdirection to the jury. That is why 13.05 allows the word "Acts" to be changed to "operation of a motor vehicle" in the definition of agency. *See also*, MAI 13.03, 13.04, and 13.06. If the agency definition submitted to the jury just used the word "acts", the only frame of reference for those acts would be the submissions of the employee's negligence, and a jury might, on its own, think that an employee is not within the scope and course while driving while intoxicated, speeding, texting while driving, running a red light, violating traffic lights - or violating railroad rules. Certainly, defense evidence about internal company prohibitions or argument of defense counsel suggesting

that the specific act of negligence must be found to be within the scope and course would be a prejudicial, erroneous statement of the law. *See Garretzen v. Duenckel*, 50 Mo. 104, 112, 1872 WL 7886 (Mo.1872) (affirming trial court's exclusion of evidence that employer had forbidden the negligent act); *see also Whiteaker v. Chicago, R.I. & P.R. Co.,* 252 Mo. 438, 160 S.W. 1009, 1014 (Mo. 1913).

In this case, it is the unloading of employee baggage that should be submitted as being within the scope and course, not the negligence in placing a gun inside the bag. This is where the Court of Appeals went off the track; by concluding that "the verdict director must require the jury to decide whether Clark's negligent conduct was committed while furthering the business of Union Pacific" (Modified Opinon at p. 13), the Court wrongly confused two separate elements of plaintiff's case. *See generally,* Restatement (Second) of Agency §230: "An act, although forbidden or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency §231: "An act may be within the scope of employment although consciously criminal or tortious."

Other courts have relied on the Restatement in differentiating between the negligent act and the authorized conduct. The Supreme Court of Vermont rejected a similar argument in *Sweet v. Roy*, 173 Vt. 418, 801 A.2d 694 (1999). "Thus, there is no requirement that the master specifically authorize the precise action the servant took. [citation] Such a requirement would mean that there could rarely be vicarious liability for intentional torts because the master would not specifically

authorize the commission of a tort. The law is to the contrary." 173 Vt. 418 (collecting cases).

In holding a cruise line liable for the rape of a passenger by its crew member, the 11th Circuit refused to narrow the traditional scope of agency. "In this same comment to the Restatement (Second) of Agency, the American Law Institute also provided the following illustration: 'P, a railroad, employs A, a qualified conductor, to take charge of a train. A assaults T, a passenger. P is subject to liability to T.'" *Doe v. Celebrity Cruises, Inc*., 394 F.3d 891, 908, n18 (11th Cir. 2004).

The 7th Circuit analyzed a similar scope of employment issue in *Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R. Co.,* 841 F.2d 1347 (7th Cir.1988) The *Wilson* court noted that "[i]n applying common law principles to the analogous agency question of when an employment relationship exists, the Supreme Court has often looked in particular to the Restatement (Second) of Agency (1957) (Restatement) as "a guideline for analysis and proper jury instructions." *Kelley*, supra, 95 S.Ct. at 476; *See also Baker*, supra, 359 U.S. at 228, 79 S.Ct. at 665; *Ward v. Atlantic Coast Line R.R. Co.*, 362 U.S. 396, 400, 80 S.Ct. 789, 792, 4 L.Ed.2d 820 (1960) (per curiam)." 841 F.2d at 1352. The Court explained that:

The Restatement provides in pertinent part as follows:

§ 229. Kind of Conduct within Scope of Employment(1) To be within the scope of the employment, conduct must be of the same general nature as that

authorized, or incidental to the conduct authorized.

This definition correctly sets forth what is the settled common law standard for defining scope of employment. See, e.g., *Croes v. United States*, 726 F.2d 31, 32 (1st Cir.1984). See also Alan Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv.L.Rev. 563 (1988) (concluding that Restatement's test generally furthers economic welfare)"

841 F.2d at 1352.

Thus, the proper definition of scope of employment includes conduct of the general nature as that authorized; in this case, unloading luggage from the crew van and any activity incidental to that task.

1. An Employee's Violation Of A Work Rule Does Not Immunize The Employer

The United States Supreme Court has held for decades that a railroad employee is acting within the scope of his or her employment, notwithstanding any claim that their acts were negligent or that they deliberately violated railroad rules.

To hold otherwise would have startling consequences. The running of trains on telegraphic orders is an everyday occurrence on every railroad in the country. Thousands of cases occur every day and every night where a failure by conductor or engineer to comprehend or to remember the message of the train dispatcher may endanger the lives of employees and passengers. We are not

aware that in any case it has been seriously contended that, because an engineer violated the orders, he went outside of the scope of the employment. If he did so, in the sense of absolving the employer from the duty of exercising care for his safety, it is not easy to see upon what principle the employer's liability to passengers or to fellow employees for the consequences of his negligence could be maintained. The unsoundness of the contention is so apparent that further discussion is unnecessary.

Spokane & Inland Empire R.R. Co. v. Campbell, 241 U.S. 497, 509 (1916).

The Supreme Court's concerns apply equally in this case: a finding that an employee deliberately violated the railroad's orders or rules does not remove that employee from the scope of employment. To hold otherwise would preclude any action under the FELA where the railroad's liability is based on the negligence of one its employees. Because Congress explicitly stated railroads can be held liable for the negligence of their employees (45 U.S.C. § 51) and explicitly banned the fellow servant defense (*Sinkler*, 356 U.S. at 330, *supra*), the trial court's ruling and rationale are in contravention of statute and precedent. *See also Jones v. Terminal R.R. Ass'n of St. Louis*, 242 S.W.2d 473, 476 (Mo. 1951) ("the cases do not hold that a negligent intentional act on the part of an employee is a defense…."); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358 (9th Cir. 1995) (railroad could be liable for negligence of employee who broke multiple railroad rules by failing to report death threats).

Defendant argued that plaintiff was required to prove that defendant either

engaged in independent acts of negligence or had notice of Clark's pistol. This conceptual compartmentalization of conduct between railroad management and railroad employees has been rejected for decades. The United States Supreme Court held that the FELA imposes liability on the railroad not only for the negligence of management but also for the negligent conduct of its employees and agents.

> Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages.

Sinkler, 356 U.S. at 330.

The fact that Plaintiff and Clark were on duty performing tasks necessarily incident to their employment when Clark failed to warn Plaintiff about the pistol

satisfies any course of employment test. In *Burrus v. Norfolk and W. Ry. Co*., 977 S.W.2d 39 (Mo.App. 1998), the court upheld partial summary judgment against a railroad for injuries that suffered by a train conductor in a collision caused by the engineer's falling asleep while operating the train. The railroad, as does Defendant here, argued the plaintiff failed to show negligence on the part of the railroad, or that the railroad had notice its employees would fall asleep. The court specifically deemed this argument to be "without merit" and explained that:

> Under FELA, plaintiff was required to show an officer, employee, or agent was responsible, through his or her negligent acts or omissions, for the presence of the unsafe condition which caused plaintiff's injuries. *Wilson v. Consolidated Rail Corp*., 875 S.W.2d 178, 180 (Mo.App. E.D.1994). As previously stated, [engineer] Burton was negligent when he fell asleep on duty and ran the engines past a red traffic signal, causing the accident which injured plaintiff. The cases cited by railroad regarding notice are not applicable, as they do not involve a railroad employee injured by the negligent acts or omissions of a fellow railroad employee.

Burrus, 977 S.W.2d at 44; *see also Wharf v. Burlington R. Co.,* 60 F.3d 631, 635 (9th Cir.1995).

Wharf was a case for injuries sustained when Wharf attempted to rescue Puhek, a co-employee. "Since FELA provides that a railroad is liable to any employee suffering injuries resulting in whole or part from the negligence of the railroad's officers, agents, or fellow employees, 45 U.S.C. § 51,as a matter of law

[the imperiled party's] negligence in endangering himself is attributable to the railroad,'[citation] as is the negligence of any co-worker who contributed to Puhek's peril and the need for the rescue.") 60 F.3d 631, 635.

In the cause *sub judice,* the railroad's argument ignores the statutory language in § 51 that imposes liability on the employer for the negligence of its employees. The railroad's attempt to compartmentalize the negligence of its employees into a different category from the negligence of management would effectively prevent liability in cases in which a co-employee's negligence caused injury. All the railroad need do to insulate itself from its statutory liability would be to tell engineers such as the one in *Burrus* not to operate a train while sleeping. This flies in the face of the statutory language imposing liability on the railroad for the negligence of its "officers, agents, or fellow employees" (45 U.S.C. § 51) but also leaves those injured by a sleeping locomotive engineer without a remedy. *See, e.g., Lee v. Transportation Communications Union,* 734 F.Supp.2d 578 (E.D.N.Y. 1990) (dismissing suit against co-employee who had actually injured the plaintiff).

The district court in *Lee* dismissed an employee's suit against his co-employee, holding that only the employer is liable under the FELA. The *Lee* court explained that one of the goals of the federal legislation was to preclude suits between co-employees for on the job injuries.

> In an effort to avoid suits between co-workers, Congress has provided a remedy to an injured employee of a 'common carrier by railroad', by imposing liability upon the employer based on the doctrine of *respondeat*

superior. Thus, even though the statute renders a railroad liable for the negligence of its 'officers, agents or employees' (45 U.S.C. § 51), the FELA imposes liability only on the railroad, and not its agents or employees (see *Lockard v. Missouri Pac. R.R. Co*., 894 F.2d 299, 302 n. 8 [8th Cir.1990]).

734 F.Supp.2d at 580.

The federal statute places the burden of liability for an employee's negligence on the railroad - and the railroad alone - in this case. The trial court committed prejudicial error in refusing to recognize this statutory liability and in failing to grant plaintiff's motion for a directed verdict on liability.

C. The FELA Imposes LIability On The Railroad For The Negligence Of A Fellow Employee

The railroad urges this Court to insulate it from liability for any negligent act not specifically authorized by the railroad. The focus, the railroad insists, is on the ultimate negligent act and not whether the employee's conduct generally was authorized. Similar arguments have been rejected for decades.

In *Baker v. Baltimore & Ohio R.R. Co*., 502 F.2d 638 (6th Cir. 1974), a railroad employee was injured when a fellow employee removed his coat from the top of a candy machine, allowing a pistol that was lying on top of the coat to fall to the ground and discharge. The railroad, as here, argued that the fellow employee was not acting in the course and scope of his employment at the time the accident occurred and that the employee's negligence resulted solely from the

improper presence of the pistol on the premises, rather than from any act in the course of his employment. Id. at 641. *Baker* held the fellow employee was in the course of his employment during his lunch break as well as while removing his coat from the candy machine. Id. at 642. The railroad, as here, argued the bringing of a gun to work was clearly outside the course and scope of employment. *Baker* rejected this argument for the same reason suggested by Plaintiff here, holding that the relevant negligent act was what the employee did while he was on duty. "In this case, however, the act complained of was Kuntz' removing his coat from the candy machine while forgetting about the pistol, in preparation for inspecting a railroad car." Id. at 643(emphasis added). The court held that under the FELA, the railroad "is liable if Kuntz' negligence in removing his coat from the candy machine while forgetting about the pistol played 'a part' in causing Appellee's injury." Id. at 643, citing numerous cases. The court sustained a plaintiff's verdict, holding that without such negligence, the pistol would not have discharged. Id. It noted that the scope of employment includes not only actual service, but also those things necessarily incident thereto. Id. at 642.

Baker is crucial because it recognizes that there may be many "acts" that culminate in an injury. In *Baker*, the employee a) had a loaded pistol; b) which he brought to work and; c) placed unsecured on top of his coat on the candy machine and then; d) grabbed the coat in a way that the pistol fell out while e) apparently forgetting that he had placed the pistol there in the first place. The negligent act for which the railroad was held to be liable was the employee's negligent failure to

remember he had brought a loaded pistol to work. 502 F.2d at 643. In this case, Clark's acts included not only putting a loaded weapon into his grip at home but also a) bringing a concealed firearm to work; b) in allowing another employee (plaintiff Cluck) to remove luggage containing the concealed firearm and in forgetting the firearm was inside the luggage, and c) in failing to warn the employee the luggage contained a loaded gun with the safety off. Acts a), b) and c) are all clearly within the course and scope of employment and subject the railroad to liability. The cause *sub judice* is identical in every significant respect to *Baker.*

Baker should end the inquiry. As in *Baker*, Plaintiff was injured after Clark forgot he had brought his pistol to work, and the pistol discharged. As in *Baker*, Plaintiff was injured while Clark was engaged in tasks incidental to his actual service to Defendant. As in *Baker*, Clark was acting in the scope of his employment at the time Plaintiff was injured.

Baker cited *Russell v. United States*, 465 F.2d 1261 (6th Cir. 1972). *Baker*, 502 F.2d at 642-43. In *Russell*, the Sixth Circuit vacated a finding that a nurse was not acting within the scope of her employment when she brought a pistol to work, against her employer's rules and state law regarding concealed weapons, and a patient was shot in the leg after a nurse dropped her purse. The Sixth Circuit held this finding did not account for the liberalization of the doctrine of *respondeat superior*. *Id*. at 1262-1264.

In *Central of Georgia R.R. v. Rush*, 239 So.2d 763 (Ala. 1970), the plaintiff

left his train, went to his car, retrieved a small derringer pistol from his glove compartment, and showed it to a conductor. Id. at 765. The plaintiff put the pistol into his shirt pocket, with the safety on, and proceeded on to a tool shed, with a lantern hanging on one arm. Id. After the plaintiff climbed onto the locomotive, he bumped its side. Id. The lantern slipped down his arm, and when he grabbed for it, the pistol fell from his shirt pocket and discharged, sending metal fragments into his eyes. Id. The plaintiff had only owned the gun for two weeks, and he did not have a permit. *Id*. The court affirmed the verdict, noting "[i]t is not disputed that appellee was employed by appellant doing an assigned job in the line and scope of his employment and performing it under conditions that presented a question of appellant's negligence to the jury when he was injured." Id. at 766. Just as the employee in *Rush* was acting in the scope of his employment, Clark surely was as well.

In *Baltimore and Ohio R.R. Co. v. Taylor*, 589 N.E.2d 267 (Ind. App. 1992), a brakeman, who was shot by a 13-year-old boy while the brakeman had put his head out on the locomotive side window in order to toss a profane message to a fellow employee, was held by the trial court to have been acting within the scope of his employment when he was shot. The court rejected the railroad's argument that the passing of the profane message was not in furtherance of the railroad's business (which the estate admitted), holding that scope of employment was a jury issue. Id. at 274. The court noted that the employee was "on the job" at the time of the injury, and refused to conclude the employee was removed from the

protection of the FELA during the brief moment he was delivering the message. Id. at 275. This finding is consistent with common sense – otherwise, the protection of the FELA could be removed at the precise moment it is needed, when an injury occurs or when the negligent act is performed.

D. The Undisputed Evidence And Defendant's Admissions Established The Plaintiff's Right To A Directed Verdict On LIability

Burrus alone compelled the instructions and rulings sought by Plaintiff. The fact that the railroad in *Burrus* did not anticipate its employee's falling asleep was deemed irrelevant. Similarly, the fact that Defendant claimed it did not anticipate its employees would ever bring guns to work is irrelevant. Furthermore, the railroad in *Burrus* was found liable on partial summary judgment even though the engineer's falling asleep while on duty surely did not further the railroad's business. Far from insulating the railroad from liability, Clark's failure to warn of the loaded pistol forms the basis for the railroad's liability. *Burrus* shows it is enough that the fellow employee was "on duty" at the time his negligence injured the plaintiff and not, as defendant urges, that the employee's negligent acts furthered Defendant's business.

The court further held that plaintiff's injuries were foreseeable, stating "injury to employees or to members of the public could reasonably be foreseen from the violation of safety rules." *Burrus*, 977 S.W.2d at 44, citing *Adams*, 280 S.W.2d at 92. "Accordingly, plaintiff only needed to show his injuries were a natural and probable consequence of railroad's negligence, and not 'that the

particular collision and injury to plaintiff could have reasonably been anticipated.'" *Id*., citing *Adams*.

II. Alternatively, The Trial Court Committed Prejudicial Error In Refusing To Submit Missouri Approved Instruction (MAI) 24.01(A) Because Plaintiff Had A Right To Have The Jury Instructed On Any Theory Supported By The Evidence In That Substantial Evidence Supported Plaintiff's Theory Of *Respondeat Superior* Liability As Submitted By Plaintiff's Instruction 7D or 7J or Alternatively Plaintiff's Instructions 7E or 7H and 7F or 7I

Assuming, *ad arguendo,* that this Court rejects plaintiff's claim that the trial record compels a directed verdict, plaintiff respectfully submits that the Court of Appeals correctly held that the trial court committed prejudicial error in refusing to submit MAI 24.01, as submitted by plaintiff. The Court of Appeals held that

The circuit court erred in failing to instruct the jury on Cluck's elected theory of imputed liability. Cluck made reasonable efforts to proffer instructions to satisfy the concerns of the court and Union Pacific that MAI 24.01(A) should be modified to address the unique facts of this case.

Modified Opinion at p. 14.

The familiar standard is that "a party is entitled to an instruction upon any theory supported by the evidence." *Vandergriff v. Mo. Pac. R.R.*, 769 S.W.2d 99, 104 (Mo. banc 1989). The Court of Appeals correctly held that the evidence established a submissible case against Union Pacific based on the imputed liability of Clark's acts to his employer. *See* Modified Opinion at pp. 14-15.

Rule 70.02(b) specifically states, "Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Instead, "Rule 70.02(c) indicates the proper standard of review: 'The giving of an instruction in violation of the provisions of this Rule 70.02 *shall constitute error*, its prejudicial effect to be judicially determined." *Marion*, 199 S.W.3d at 892, quoting Rule 70.02(c). "We review the trial court's refusal to give Ms. Marion's proffered instructions *de novo*, evaluating whether the instructions were supported by the evidence and the law." *Id.* at 893-894, citing Rule 70.02(a).

The trial court's rulings on instructions are given little deference. *See Closson v. Midwest Division IRHC, LLC*, 257 S.W.3d 619, 625 (Mo.App. 2008), quoting *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 120 (Mo.App. 2006) ("Our review of whether the jury was properly instructed is a question of law and is to be determined on the record with little deference given to the trial court's decision."). "'Jury instructions must be supported by substantial evidence,' and 'we review the evidence and inferences in a light most favorable to the submission of the instruction, disregarding all contrary evidence and inferences.'" *Closson*, 257 S.W.3d at 625, quoting *Wright v. Barr*, 62 S.W.3d 509, 526 (Mo.App. 2001). "Instructions given must be in compliance with MAI if one exists that is applicable to a particular case." *Closson*, 257 S.W.3d at 625, quoting *Thompson*, 207 S.W.3d at 125 (citing Rule 70.02(a)). "'The verdict is

reversed if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error.'" *Closson*, 257 S.W.3d at 625, quoting *Thompson*, 207 S.W.3d at 125 (quoting *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003).

Because "MAI instructions, promulgated and approved by the Supreme Court, are authoritative if applicable to the factual situation," the trial court was "bound by them as surely as it is bound by Supreme Court cases and rules." *Clark v. Missouri & N. Arkansas R.R. Co.*, 157 S.W.3d 665, 671 (Mo.App. W.D. 2004), quoting *Lindsay v. McMilian*, 649 S.W.2d 491, 493-94 (Mo.App. W.D. 1983). The Notes on Use "are an integral part of the system of Missouri Approved Instructions." *Clark*, 157 S.W.3d at 671, quoting *Gormly v. Johnson*, 451 S.W.2d 45, 46-47 (Mo. 1970). The Missouri Supreme Court demands "strict adherence" to MAI and that the Notes on Use "be religiously followed." *Clark*, 157 S.W.3d at 671, quoting *Royal Indem. Co. v. Schneider*, 485 S.W.2d 452, 458 (Mo.App. W.D. 1972). "If the trial court is to make this [MAI] system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that the pattern instructions be used as written." *Davis v. St. Louis S.W. RR. Co.*, 444 S.W.2d 485 (Mo. 1969), quoting *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 258 (Mo. banc 1967).

Rule 70.02(b) specifically states, "Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the

exclusion of any other instructions on the same subject." Rule 70.03(c) states, "The giving of an instruction in violation of the provisions of this Rule 70.02 shall constitute error, its prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 70.03." Plaintiff tendered several MAI 24.01(A) instructions, and both parties objected to the trial court's MAI 24.01(B) instruction before the submission of instructions to the jury. As such, there was clearly error in the trial. Because this error went to the verdict director itself, and amounted to a directed verdict on Plaintiff's strongest theory of liability, the Court of Appeals properly held that the error was prejudicial.

But the Court of Appeals erred in finding that the verdict director must posit the element of *respondeat superior*. As argued in Section A. 1, above, there was no dispute about any fact necessary to a finding that Clark was acting within the course and scope of his employment. The Court of Appeals correctly found that that "[t]he evidence at trial established that Clark had a loaded handgun in his bag *while he was traveling for a work-related purpose*." Modified Opinion at p. 9 (emphasis added). There was no dispute that Clark, like plaintiff Cluck, was traveling on the railroad's business, in a crew van selected and operated by the railroad, to a a motel chosen by the railroad for the convenience of the railroad. There was no dispute that Cluck and Clark were on duty. There was no dispute that unloading the van was a necessary incident of the trip to Coffeyville, Kansas. These facts were, as the Court of Appeals characterized them, "uncontroverted." Modified Opinion at p. 9. In these circumstances, Clark was within the scope and

course of employment as a matter of law and the Court of Appeals erred in requiring submission of that element. *See Stipp v. Meadows*, *supra*, 996 S.W.2d 764, 765-766 (directed verdict for plaintiff required where there is no dispute concerning basic facts which are supported by uncontradicted testimony).

1. Plaintiff's Tendered Instructions 7D and 7H Properly Submitted MAI 24.01A To The Jury And Did Not Require A Scope And Course Element

The Court of Appeals erroneously concluded that the jury should have been required to consider the railroad's scope and course of employment claim with regard to plaintiff's submission of the failure to warn claim. Plaintiff's Instructions 7D and 7J did not submit bringing the gun to work as negligence but rather submitted only the failure to warn Cluck:

Plaintiff's Instruction No. 7D:

"Your verdict must be for plaintiff if you believe:

First, defendant's employee failed to warn plaintiff that he had placed a loaded gun with the safety set to "off" in his luggage;

and

Second, defendant's employee was thereby negligent, and

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

Legal File, p. 697.

This instruction was a proper MAI 27.01(A) instruction and submitted an act of negligence - failing to warn Cluck of the gun in the luggage - that was

indisputably within the scope and course of of Clark's employment. Under this instruction, how the gun got into Clark's luggage didn't matter; what mattered was that Clark knew of that dangerous condition and failed to warn the plaintiff. The Court of Appeals erred in requiring submission of the scope and course element to the jury with regard to that act of negligence, particularly in light of that Court's finding that "[t]he evidence at trial established that Clark had a loaded handgun in his bag *while he was traveling for a work-related purpose*." Modified Opinion at p. 9 (emphasis added).

Similarly, the trial court erred in refusing Plaintiff's Instruction No. 7J which read:

> "Your verdict must be for plaintiff if you believe:
>
> First, Larry Clark failed to warn plaintiff of an unsafe condition; and
>
> Second, Larry Clark was thereby negligent, and
>
> Third, such negligence resulted in whole or in part in injury to plaintiff."

Legal File, p. 697.

This instruction, like Plaintiff's Instruction 7E was a proper MAI 24.01A instruction. It also submitted the failure to warn claim which under the circumstances of this case did not require submission of the scope and course element. There was no suggestion that more than one unsafe condition existed or resulted in plaintiff's injury. The trial court erred in refusing to submit this instruction. That error was prejudicial and requires reversal.

2. Assuming *Ad Arguendo* That Course And Scope Was A Requirement, The Trial Court Erred In Refusing To Give Plaintiff's Verdict Directors 7E or 7H and Either Instruction 7F or 7I Defining Scope And Course Of Employment

Plaintiff's Instruction 7E read:

> Your verdict must be for plaintiff if you believe:
>
> First, Larry Clark was acting within the scope and course of his employment by defendant Union Pacific railroad at the time of the gunshot incident;
>
> Second, Larry Clark failed to warn plaintiff that he had placed a loaded gun with the safety set to "off" in his luggage;
>
> Third, Clark was thereby negligent, and
>
> Fourth, such negligence resulted in whole or in part in injury to plaintiff.

Appendix, A25, Legal File, p. 699.

Plaintiff's Instruction No. 7F:

> Acts were within the scope and course of employment as that phrase is used in these instructions if:
>
> 1. They were done by Larry Clark partially to serve the business interests of defendant Union Pacific Railroad and partially to carry out the interests of Clark
>
> 2. Union Pacific Railroad's business created the necessity for the trip, and

3. Union Pacific Railroad either controlled or had the right to control the physical conduct of Clark.

Legal File p. 700 (vol. IV).

In combination, these two instructions accurately submitted the imputed liability of MAI 24.01A.

Alternatively, the trial court should have submitted Plaintiff's Instructions No. 7H and 7I. Plaintiff's Instruction No. 7H read:

Your verdict must be for plaintiff if you believe:

First, Larry Clark was preparing to enter a hotel within the course and scope of his employment by defendant Union Pacific Railroad; and

Second, Clark failed to warn plaintiff of an unsafe condition; and

Third, Clark was thereby negligent, and

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

Legal File p. 702 (vol. IV).

Plaintiff's Instruction No. 7I:

Preparing to enter a hotel is within the "scope and course of employment" as that phrase is used in these instructions if:

1. it was a part of the work Larry Clark was employed to perform, and

2. it was done by Larry Clark to serve the business interests of Union Pacific Railroad.

Legal File p. 703 (vol. IV).

Again, these two instructions in combination accurately submitted both MAI 24.01A and the scope and course of employment element. The trial court erred in refusing to submit them.

III. The Trial Court Erred Because It Refused Plaintiff's Request to Withdraw The Issue Of Prior Payments To The Plaintiff In That A False Issue Had Been Created By The Introduction Of Evidence That Plaintiff Would Refuse Work That Paid Less Than $2,350.00 Per Month

The standard of review for the refusal to give a withdrawal instruction is abuse of discretion. *Eckerd v. Country Mut. Ins. Co.*, 289 S.W.3d 738, 747 (Mo.App. 2009). "Failure to give one is reversible error only when the evidence sought to be withdrawn creates a false issue." *Id.*

In this case, it was clear that a false issue had been created, such that MAI 34.05 should have been submitted. Defendant introduced evidence over Plaintiff's objection that Plaintiff would not accept any position that netted him less than $2,350.00 per month. The jury clearly understood why the figure was so precise, asking the trial court during deliberations if Plaintiff was receiving any disability payments. MAI 34.05 specifically states it must be given if the jury has engaged in collateral source supposition. *See* MAI 34.05, Committee Comments ("… **the jury may have knowledge of some prior payment**. **Such knowledge may be**

acquired from impeaching evidence, a nonresponsive answer, **collateral source supposition**, … the jury is likely to speculate about the effect of such payment on its award.") (emphasis added).

The use of MAI 34.05 was clearly required under these circumstances, such that the refusal to issue the instruction was error. *See Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28, 36 (Mo.App. 1995) ("Where the evidence is of a character that might easily lead to the raising of a false issue, the court ought to guard against such an issue by appropriate instruction."); *Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757, 764 (Mo.App. 1995) (affirming submission of withdrawal instruction; "Withdrawal instructions should be given when there is evidence which might mislead the jury in its consideration of the case as pleaded and submitted."); *Harris v. Washington*, 654 S.W.2d 303, 307 (Mo.App. 1983) (affirming new trial where trial court refused to submit withdrawal instruction).

The trial court's refusal to issue a MAI 34.05 instruction, once it was clear the jury was engaging in collateral source supposition, was prejudicial error. This issue is likely to recur on re-trial. Plaintiff respectfully submits that evidence of prior payments should be excluded entirely. Courts have long recognized that in FELA cases, the danger with any evidence suggesting the plaintiff has received collateral source payments is that a jury might decide not to compensate the plaintiff ***at all*** and render a verdict for the railroad. *See Eichel v. New York Central R.R. Co.*, 375 U.S. 253 (1963), *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34 (1963); *Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029(10th Cir.

1995). The Tenth Circuit held the admission of such evidence was not harmless, even though the jury had rendered a defense verdict, noting that "[t]he major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation." *Green*, 59 F.3d at 1033. Plaintiff respectfully requests that this Court order any evidence of payments to the plaintiff barred on re-trial.

IV. The Trial Court Erred In Barring Deposition Testimony From One Of Defendant's Managers That He Was Aware Of Reports Of Defendant's Employees Being Disciplined For Bringing Weapons To Work Because Defendant Had Waived Its Objection In That Defendant Had Failed To Object To The Testimony During The Deposition And Defendant Had Elicited Testimony That The Railroad Had No Knowledge That Any Of Its Employees Had Brought Guns To Work Or That Any Disciplinary Action Had Been Taken Toward Any Employees For Such Conduct

"Generally, appellate review of the trial court's ruling on the admission of evidence is limited to whether the court abused its discretion." *Eckelkamp v. Burlington Northern Santa Fe Ry. Co.*, 298 S.W.3d 546, 550 (Mo.App. 2009) However, an evidentiary ruling that ignores case law and Missouri Supreme Court rules compels reversal. *See id.* at 549-554 (trial court committed reversible error in allowing railroad to display statute regarding duty of motorists to the jury

because law can only be conveyed to jury through instructions). Moreover, "There is no judicial discretion to ignore the clear, unequivocal dictates of the Supreme Court Rules." *State ex rel. Bohannon v. Adolf*, 724 S.W.2d 248, 250 (Mo.App. 1987).

A. Because Defendant did not make any objections during the deposition testimony of the witness, and the Missouri rules of procedure require the parties to make any objection that can be cured within a deposition during the deposition if they do not wish to waive the objection, it was error to exclude Cole's testimony

Defendant did not make any objections to the testimony at issue during Cole's deposition. Defendant's objections were first raised nearly three years after the deposition. The Missouri rules of procedure require a party to make any objection that can be cured within the deposition ***during*** the deposition; otherwise, the objection is waived. *See* Missouri Supreme Court Rule 57.07(b)(4) ("… errors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition.").

Defendant's objection at trial was that it was unclear if Cole was referring to Public Law Board reports he had seen before or after Plaintiff's gunshot wound. This was clearly an objection that could have been cured by Plaintiff's counsel had Defendant raised this objection during Cole's deposition. Because Defendant did

not make any such objection at the deposition, it was error to exclude Cole's testimony on this subject. *See Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 210 (Mo. banc 1991) "The rule serves to give questioning counsel an opportunity to rephrase the question, lay a better foundation or clarify the question so that evidence will not be rejected at trial because of inadvertent omissions or careless questions.") …Defendant waived its objections to this testimony by waiting until trial to raise them. *See id.* ("Waiting until trial to raise the objections amounts to a waiver of the claims that the answers should not have been admitted because they were too speculative and conjectural."). *See also Turnbo v. City of St. Charles*, 932 S.W.2d 851, 856 (Mo.App. E.D. 1996); ("A party who fails to object at a deposition that questions and responses were not framed in terms of "reasonable medical certainty waives the objection."); *Brooks v. SSM Health Care*, 73 S.W.3d 686 (Mo.App. S.D. 2002):

> **No objections as to foundation were made at the time of the deposition. … At the deposition neither defendant objected to an improper foundation for the opinion. … A motion to strike is untimely and any alleged error is waived if the motion is made too late to give opposing counsel an opportunity to fix any deficiencies in the question or lay an appropriate foundation for the witnesses' opinion.** … "[E]rrors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition." Rule 57.07(c)(4).

Id., citing *Seabaugh* (emphasis added).

A finding of waiver was mandated by Missouri authority. Moreover, Defendant's objections went to the weight of the evidence, not its admissibility. *See Mid-Am. Lines v. Littrell*, 653 S.W.2d 391, 392-93 (Mo.App. W.D. 1983) (evidence regarding condition of gate and latch seven months ***after*** incident was admissible; "Defendants' objection of remoteness went to the weight of the Stevens testimony and the photo, not to their admissibility … The weight and credibility of both fell within the province of the jury as factfinder."). Accordingly, this testimony from Cole should have been admitted, with the parties free to argue its weight to the jury.

B. Because Defendant was allowed to present testimony that its employees had not received any notice of such incidents either before or after Plaintiff's gunshot wound, Plaintiff's evidence was properly admissible under the doctrine of curative admissibility, if it were not otherwise admissible

Defendant elicited testimony from its corporate representative that he had not received any notice ***at any time*** that employees were bringing guns to work. Defendant voluntarily interjected the issue of whether it had received notice at any time into the trial. Having done so, Plaintiff was entitled under the doctrine of curative admissibility to introduce countervailing evidence from Cole that he had read Public Law Board reports in which Defendant's employees were disciplined for carrying a firearm while at work. *See Watson v. Landvatter*, 517 S.W.2d 117 (Mo. banc 1974):

> It is clear that a party cannot elicit irrelevant evidence, constituting part of an entire transaction, to his benefit and then object to a continuation of evidence of that transaction by the opposing party to refute the adverse inferences which might arise from the incomplete nature of the evidence he introduced. … When a part of an improper subject of inquiry has been voluntarily broached by one party, the other party may examine the remainder of that subject of inquiry to the end that the entire transaction may be analyzed more dependably.

Id. at 122 (citations omitted).

Because Defendant elicited testimony on this issue, its objections were waived. "An objection to the admission of evidence is waived where the same or similar evidence has been elicited or introduced by the objector." *Alvey v. Sears, Roebuck and Co.*, 360 S.W.2d 231 (Mo. 1962). *See also Mische v. Burns*, 821 S.W.2d 117, 119 (Mo.App. 1991) (" '[A] party who opens up a subject is held either to be estopped from objecting to its further development or to have waived his right to object to its further development."); *Collins v. Missouri Director of Revenue*, 2 S.W.3d 164, 168 (Mo.App. 1999) (where petitioner's attorney elicited testimony regarding breathalyzer figure during cross-examination, petitioner waived any foundation objection regarding breathalyzer results)..

C. The exclusion of this evidence was prejudicial

Because the trial court submitted a verdict director that required the jury to find that Defendant knew, or by the exercise of reasonable care, could have

known, of the unsafe working conditions (i.e., the fact that employees were bringing guns to work), the exclusion of evidence that Defendant's managers were aware this was happening was clearly prejudicial. This prejudice was magnified when Defendant was allowed to elicit testimony that it had ***never*** received such notice, when both parties knew there was evidence Defendant had received such notice. As such, Plaintiff is entitled to a new trial on the direct negligence theory as well as the imputed liability theory.

CONCLUSION

WHEREFORE, Plaintiff urges this Court reverse the judgment of the trial court and remand with instructions for a new trial in which Defendant's liability has been established as a matter of law, with the new trial limited to the damages Plaintiff has suffered. In the alternative, Plaintiff requests this Court reverse the judgment of the trial court and remand with instructions for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I hereby certify that Appellant's Brief complies with the limitations contained in Rule 84.06(b), as amended by Special Rule XLI, and that Appellant's Brief contains 15,201 words according to the Microsoft Word for Windows software used to prepare the brief, not including those contained in the table of contents, table of authorities or appendix.

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I hereby certify that the CD-ROM containing a full and complete copy of Appellant's Brief in Microsoft Word for Windows format has been scanned for viruses and that it is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Initial Brief, as well as a CD-ROM containing the same in Microsoft Word format and otherwise in compliance with Rule 84.06(g), was forwarded via U.S. Mail, proper postage prepaid, on the 20th day of June, 2010 to:

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