IN THE SUPREME COURT OF MISSOURI

Ordered Filed as Do mtn 6/20/11.

SC 91617

EDDIE CLUCK,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

APPEAL FROM THE

CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

HONORABLE ANN MESLE, JUDGE

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens. Viewed broadly, the issue presented by this case is whether the master may define its own duty under the law of *respondeat superior*. More specifically, the issue is whether in an FELA case a jury is required to find that a railroad employee alleging injury due to a negligent co-employee must prove that the co-employee was in the course and scope of his employment when the specific negligent act was performed even though the co-employee was unquestionably serving the master's interests at the time of injury. These are important questions that arise in many cases arising under Missouri law as well as federal law. Accordingly, this issue is of considerable interest to MATA and its members.

On behalf of the citizens of the State of Missouri, MATA urges this court to reverse the rulings of the Courts below by finding that where the master has authorized the general activity of the servant, it is no defense that the specific negligent act was prohibited.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Appellant, Eddie Cluck, to file this brief. MATA sent a request for consent for the filing of this brief to counsel for the Respondent, however, the Respondent has not consented to the filing of this brief. Therefore, MATA seeks concurrently with the filing of this brief an order from this Court pursuant to Rule 84.05(f)(3) granting leave to file this *Amicus Curiae* brief. (See Motion of Missouri Association of Trial Attorneys for Leave to File Brief as Amicus Curiae in Support of Appellant).

JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of Appellant.

STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Appellant.

ARGUMENT AND AUTHORITY

I. OVERVIEW: THE LAW DOES NOT AUTHORIZE THE MASTER TO EXCLUDE NEGLIGENT ACTS FROM THE SCOPE OF EMPLOYMENT WHEN THE MASTER HAS AUTHORIZED THE SERVANT'S GENERAL ACTIVITY.

A federal statute, 45 U.S.C. §51-60, imposes liability on the railroad for the negligence of a co-employee. The misperception of the law by the courts below eviscerates the liability for co-employee negligence expressly recognized by the statute, unless (according to the courts) there is prior knowledge (notice and/or acquiescence) of the railroad that the negligence has or is about to occur.

The law is clear that it is the general activity of the employee that must be authorized and within the scope of employment so as to serve the interests of the master and be subject to control or right of control. *See, e.g., Southers v. City of Farmington,* 263 S.W.3d 603, 619 n22 (Mo.banc 2008); *Garretzen v. Duenckel*, 50 Mo. 104, 112, 1872 WL 7886 (Mo.1872).

In *Southers,* this Court explained that "An 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, supra,* 263 S.W.3d 603, 619 n22. Thus, the railroad is exculpated only if the negligent act of the fellow servant was "entirely" upon his own impulse, and "entirely" for his own amusement. Even if the act was partially for his own

impulse or amusement, any minor purpose that benefited the employer is sufficient to impose liability.

What were the negligent acts? a) Placing a loaded gun in his grip (suitcase used for work) at home. In such case, no liability, so long as the grip is not brought to work. But in that case there is no accident, no injury and no lawsuit. b) Bringing the grip to work with a loaded gun inside. This is clearly for the benefit of the employer. Clark needed the contents of the grip to do his job which included staying overnight at the hotel. The fact that the gun was not necessary does not change the fact that the grip and other contents were necessary. Thus the fellow servant negligently maintained at the work place a grip that was unsafe. The presence of the unsafe grip at the work place was for the benefit of the employer at least in part. It is not a defense that the employee's purpose was not exclusively for the employer's benefit. c) Forgetting that he had placed a loaded gun in his grip when he and his co-workers were unloading their grips from a van paid for by the railroad while on a trip arranged by the railroad to further the railroad's interests. The general activity (unloading of the grips) was clearly done to benefit the employer, such that it is no defense for the employer to argue the specific act (forgetting about the gun) did not benefit it.

The *Southers* case is the most recent decision from this Court to hold that an employee remains in the course and scope of employment even when acting negligently or against orders. But the doctrine is ancient. In the *Garretzen* case, a customer asked a salesman in a gun and ammunition store to load a gun so that the customer could see it in action. The customer refused to purchase the weapon unless the salesman loaded it. The

salesman loaded the gun and it discharged, wounding the plaintiff who was sitting in a house across the street. The defendant employer claimed that the salesman was acting outside of the scope and course of employment because the act of loading the gun was against orders. This Court affirmed the trial court's exclusion of evidence of the master's orders and explained that:

> The court committed no error in ruling out the evidence offered by the defendant for the purpose of showing that the act of loading or charging guns in a store is no part of the business of selling the same. If we admit that the servant did an unauthorized act, the evident truth still remains that it was done wholly in carrying out and executing his master's business, and in such a case the master will be held liable. When the servant acts in the course of his employment, although outside of his instructions, the master will be held responsible for his acts.

Garretzen, supra, 50 Mo. 104, 112, 1872 WL 7886, *5.

Furthermore,

> [t]he rule of *respondeat superior*,... is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of the servant's employment.

Id. (citations omitted). *See also Minter v. Pacific R.R.*, 41 Mo. 503, 1867 WL 4769, *3 (1867).

As early as 1852 the United States Supreme Court noted that:

> It is a general doctrine of law, that, although the principal is not ordinarily liable, (though he sometimes is,) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or cooperated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade them, or disapproved of them. In all such cases, the rule applies, *Respondeat superior.*

Philadelphia & Reading R Co v. Derby, 55 U.S. 468 (1852), citing Story on Agency, p. 465, ch. 17, § 452.

The trial court in the cause *sub judice* confused the correct standard and accepted the defense argument that it is the specific act of negligence that must meet those standards. However, the specific act of negligence never serves the interests of the master – it is always a disservice. Under this improper standard, a jury could improperly find that the master cannot control stupidity, violations of law, violations of employment rules, or negligence – because the employer cannot be there with the employee every second. Thus, according to the trial court, *respondeat superior* does not impute liability for the servant's wrong to the master, but is instead a separate species of liability for the master's own negligence.

The problem is that the improper standard utilized by the trial court allows a master to define its own duty under the law of *respondeat superior* by creating extensive lists of work rules or prohibitions of employee conduct regarding speed limits, texting while driving, lookout, drinking, drugs, and anything else imaginable – and then successfully claim that prohibited negligent acts are outside the scope of employment, did not serve the interests of the master, and that the master tried but could not control the specific act of negligence if an employee is determined to break the master's rules through obstinacy, carelessness or stupidity.

The fallacy of requiring the specific negligent act to be done in the course and scope can be readily demonstrated. Take a case where a locomotive engineer stays up all night playing cards at home with his friends instead of getting proper rest (as is required by railroad rules). The next day he reports to work and, due to his poker fueled tiredness, falls asleep at the wheel, smashing into another train and injuring his fellow employees. Would any court actually allow the railroad to defend such a case with the claim that it is not liable because the railroad did not know that the engineer did not get enough sleep at home and his failure to do this was outside the course and scope of his employment? The Missouri Court of Appeals answered this question with an unequivocal "no." *Burrus v. Norfolk and W. Ry. Co.*, 977 S.W.2d 39 (Mo.App. 1998) (railroad's liability was established by proof that the engineer fell asleep while operating train and ran through red signal causing collision).

Neither evidence nor argument of this type of "defense" should be permitted. *See Garretzen, supra,* 50 Mo. 104, 112 (affirming exclusion of evidence of the rule or order

prohibiting the negligent act on the ground that "it is immaterial whether the particular act causing the injury was done in disregard of the general orders or specific commands of the master.") To hold otherwise would turn master-servant law on its head, which until now has held that it is the general activity that must be within the scope, and imposes liability upon the master when performed negligently.

A. THE FELA, 45 U.S.C. 51, EXPRESSLY PROVIDES THAT A RAILROAD IS LIABLE TO AN INJURED EMPLOYEE WORKING IN INTERSTATE COMMERCE WHEN THE EMPLOYEE SUFFERS INJURY DUE TO THE NEGLIGENCE OF A CO-EMPLOYEE AND DOES NOT REQUIRE THAT THE SPECIFIC NEGLIGENT ACT ALLEGED BE DONE IN THE COURSE AND SCOPE OF THE CO-EMPLOYEE'S WORK.

The FELA is a broad remedial statute that must be construed liberally to effectuate its humanitarian purposes. *Urie v. Thompson*, 337 U.S. 163, 180 (1949). With this in mind, both the United States and Missouri Supreme Courts have guarded with particular sensitivity the right to have juries decide FELA cases. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360, 82 S.Ct. 780, 784 (1962); *Blair v. Baltimore and Ohio Railroad Company*, 323 U.S. 600, 602, 65 S.Ct. 545, 546 (1945); *Zibung v. Union Pacific Railroad Company*, 776 S.W.2d 4, 5 (Mo. 1989). To allow the jury to do its job, the principles of federalism mandate that jury instructions given by a court must follow substantive federal law. *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409 (1985).

In the same vein, state courts hearing FELA cases must afford plaintiffs all of the benefits the law provides. *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500 (1957). One such benefit is that a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ...resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier...." 45 U.S.C. 51.

The question before this Court is, simply, what do the words used by Congress mean? The first order of business when determining what a statute means is to determine whether the words used are plain and clear. *DePoortere v. Commercial Credit Corp.,* 500 S.W.2d. 724, 727 (Mo. 1973). Where the words of a statute are clear the court need look no further to determine what is meant. *Missouri Division of Employment Security v. Labor and Industrial Relations Commission of Missouri*, 637 S.W.2d 315, 318 (Mo.App.W.D. 1982) ("The legislature is presumed to have intended exactly what it states and if the language used in the statute is clear and unambiguous there is no room for construction. ... Effect must be given to the legislative intent from what the legislature said and not from what the legislature may have intended to say or inadvertently failed to say.")

Reading the text of the FELA in a manner consistent with these principles lends great credence to the opinion of the United States Sixth Circuit Court of Appeals in *Baker v. Baltimore & Ohio R.R. Co.*, 502 F.2d 638, 641 (6th Cir. 1974). *Baker* involved an injury from the accidental discharge of a gun in a railroad lunch room where the railroad,

as here, argued the bringing of a gun to work was an act of negligence for which it could not be held liable. The *Baker* court rejected that argument and held that:

> Under the FELA a defendant's liability for the negligence of its servants is not restricted by the common law doctrine of *respondeat superior*. Rather, the FELA has made the railroad liable to injured employees 'for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees' of the railroad. 45 U.S.C. § 51 (1972). It is unnecessary to show that such persons were negligent while performing a particular act 'in furtherance of their master's business,' as this common law term has been interpreted.

Baker v. Baltimore & Ohio R.R. Co., 502 F.2d 638, 641 (6th Cir. 1974), *citing Jackson v. Chicago, R.I. & P.Ry.*, 178 F. 432 (8th Cir. 1910).) The *Baker* court properly found that the statute is simply devoid of any requirement that the negligent act of the offending employee be done in the course and scope of his or her employment; the statute requires only that the negligent actor be an employee. *Id.*

Given the clear text at issue and the broad remedial nature of the FELA, this Court should adopt the holding in *Baker* and read the statute as written to reject a "course and scope" requirement in FELA co-employee negligence cases. *See Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326, 329-331 (1958). *Sinkler* read the text of the FELA as precluding the common law independent contractor defense. The Supreme Court held that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of s 1 of FELA." *Sinkler, supra,*

356 U.S. at 331-332. The Court specifically rejected the common law requirements that the railroad could not be liable unless it controlled the actions of the contractor. *See Sinkler, supra,* 356 U.S. at 331 ("corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant...") *Sinkler* buttresses the conclusion of the 6th Circuit in *Baker*: the statute should be read as it is written to hold the railroad liable when an employee's negligence injures a co-employee.

B. IF THIS COURT APPLIES THE TRADITIONAL "COURSE AND SCOPE" OF EMPLOYMENT TEST, THAT TEST REQUIRES ONLY THAT THE GENERAL ACTIVITY IN WHICH THE CO-EMPLOYEE WAS ENGAGED AT LEAST PARTIALLY FURTHERED THE EMPLOYER'S BUSINESS AND NOT THAT THE EMPLOYER AUTHORIZED THE SPECIFIC ACT OF NEGLIGENCE.

In the case at bar the trial court refused to give MAI 24.01(A), which would have submitted the direct negligence of Cluck's co-employee in leaving a loaded weapon in his suitcase and failing to tell Cluck about it. The appellate court properly reversed, finding that the instruction was warranted under the evidence, but also held:

> In cases such as this where there is no allegation of the railroad's direct negligence and recovery is sought on the sole theory of *respondeat superior,* the fact finder 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.

Cluck v. Union Pacific Railroad Company, Ct. App. W.D. Mo., No. WD 70792, p. 12-13, January 11, 2011.

The cases relied upon by the appellate court for this proposition involve injury due to "horseplay" or "sportive acts" of a co-employee. *See e.g. Lavender v. Illinois Central Railroad Co.*, 219 S.W.2d 353 (Mo. 1949) (railroad not liable for death of employee killed by co-employees playing with guns at work); *Gallose v. Long Island R.R. Co.*, 878 F.2d 80, 83 (2d Cir. 1989) (railroad not liable for sportive acts but could be liable if employee brought dog to work for her protection); *Sobieski v. Ispat Island, Inc.*, 413 F.3d 628, 631 (7th Cir. 2005) (defendant not liable for neck injury resulting from horseplay); *Copeland v. St. Louis-San Francisco Ry. Co.*, 291 F.2d 119 (10th Cir. 1961) (railroad not liable for prankish act of employee who injured co-employee by pushing upward on end of heavy crosstie co-employee carried on his shoulder).

As in the vast majority of FELA claims, the "horseplay" cases are inapposite here as there has not been, and cannot be, any contention that any kind of sportive act or horseplay was involved in Cluck's injury. Cluck's co-employee was assisting with the unloading of a van on behalf of the railroad when Cluck was injured.

The broad holding of the Court of Appeals, however, seems to require that in every FELA case the injured employee must prove that the specific negligent act of the co-employee was in furtherance of the railroad's enterprise, not that the co-employee was generally in the scope and course of his employment when plaintiff was injured. Such a

holding would lead to bizarre and unfair verdicts as a railroad would claim in virtually every case that it did not and does not approve of the negligent acts claimed and therefore such acts are beyond the course and scope of the co-employees job.

The danger of such an upside down world is not merely theoretical. One need only look at rule 1.6 of the General Code of Operating Rules (GCOR)[1] entitled "Conduct", which applies to all of respondent's employees and mandates, "Employees must not be: 1. Careless of the safety of themselves or others; 2. Negligent..." Appendix pg. A1. Under GCOR 1.6, and the holding of the Court below, one could easily see railroad counsel claiming that the careless or negligent acts of its employees were not within their scope of employment as provided by the railroad's own rules and thus the railroad is not liable.

Even if the railroad did not win this argument as a matter of law it would request that the issue be submitted to the jury. In a twist that would make Lewis Carroll green with envy, a jury finding that the co-employee negligently injured the plaintiff would, by the very finding of negligence, simultaneously relieve the railroad from liability for the negligence and plaintiff's injuries. Such an unjust result could hardly be said to be contemplated by the FELA. *Urie*, 337 U.S., at 180.

Instead, Congress expressly abolished the fellow-servant doctrine, an affirmative defense that employers were not liable for the negligent acts of its employees, when it

[1] Virtually every railroad in the country has adopted GCOR 1.6 or a substantially similar rule.

enacted the FELA. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994), citing 45 U.S.C. § 51. The rulings of the trial court and the appellate court would effectively reinstate this defense because the railroad would be immunized from liability anytime its employees acted negligently because such negligence would be unauthorized and therefore outside of the scope of employment.

If this court adopts a "course and scope" requirement it should only apply in those rare cases where there is a genuine dispute as to whether the co-employee was generally within the scope and course of his work. *Southers v. City of Farmington,* 263 S.W.3d 603, 619 n22 (Mo.banc 2008). Otherwise railroads would avoid liability in virtually every case for the negligent acts of its employees as such acts are rarely, if ever, directly condoned by the railroad.

MATA adopts the position of Appellant Eddie Cluck.

CONCLUSION

For the reasons stated above, the Court should reverse the rulings of the trial Court and opinion of the Appellate Court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer disk containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 4,292 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing were mailed, postage prepaid, this 20st day of June, 2011 to:

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APPENDIX

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misconduct or negligence that may affect the interest of the railroad.

1.5 Drugs and Alcohol

The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome

or

7. Discourteous

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