No. 320669

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

BRENT McFARLAND,

Appellant,

v.

BNSF RAILWAY COMPANY,

Respondent.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. Judicial Opinions

2. Statutes

3. Court Rules

I. INTRODUCTION

Plaintiff Brent McFarland was a carman employee of the defendant BNSF Railway Company, and he was employed by BNSF at its Pasco, Washington freight car repair track. Plaintiff contends that he sustained injuries to his right shoulder, including a tear of the right rotator cuff, while using a 12-pound sledge hammer to manually drive in and install a 55-pound steel cross key – a freight car part – into a freight car draft sill and coupler during December of 2009. While swinging the sledge hammer hard and forcefully to drive in the cross key, Plaintiff felt a sudden tearing and burning sensation in his right shoulder. Following this injury, Plaintiff obtained an appointment with and came under the care of Dr. Kontigianos, an orthopedic surgeon, during March of 2010. Ultimately, plaintiff underwent a right shoulder rotator cuff surgical repair on June 21, 2010. Plaintiff was off work from the time of surgery until September 20, 2010.

Plaintiff's lawsuit was filed on January 30, 2012 and brought under the Federal Employers' Liability Act, 45 USC Section 51, *et seq.* ("FELA"). Although the FELA is markedly different in multiple ways from common law negligence, FELA is still a negligence-based statute. A plaintiff must convince a jury that the defendant railroad was negligent, in some respect, before the

plaintiff is entitled to recover any damages. In this case, as is discussed in more detail below, plaintiff contended defendant's negligence arose primarily from two acts/omissions.

First, it was undisputed that defendant BNSF had – approximately 10 years earlier (circa 1999) – confiscated and removed all of the sledge hammers at BNSF's Pasco Washington freight car repair track that weighed more than 12 pounds, e.g. 16 lb., 18 lb., 20 lb., and 22 lb. sledge hammers, and instead provided only 10 lb. and 12 lb. sledge hammers to perform work. When the heavier sledge hammers were confiscated and removed in the late 1990s, the carmen employees at Pasco complained that they were forced to use the lighter weight sledge hammers which required the carmen to exert even more force in an effort to drive in difficult 55-pound cross keys. Use of the lighter weight sledge hammers resulted in greater physical effort and greater recoil as the lighter weight sledge hammers bounced off the 55-pound cross keys. Plaintiff contended the railroad failed to provide safe tools and methods of work by not returning the heavier sledge hammers for use under these circumstances.

Second, Plaintiff contended that BNSF should have provided and also put into use mechanical equipment, specifically a hydraulically powered cross key pusher/installer manufactured by

Omega Industries, use of which entirely eliminated striking difficult 55 pound steel cross keys with sledge hammers. Development of the Omega hydraulic cross key installer was a project between the BNSF Vancouver Washington freight car repair shop and Omega Industries. The development project began in about 2000, after the heavier sledge hammers had been confiscated and removed at BNSF's Vancouver facility. The BNSF General Foreman at Vancouver, Vern Peterson, assigned a Vancouver BNSF Supervisor, Robert Russell, to work on developing a hydraulically powered cross key installer because BNSF General Foreman Peterson did not want his employees using sledge hammers. A first generation Omega hydraulic cross key installer was produced in approximately 2002, but testing of the installer at Vancouver demonstrated it was not satisfactory. A second generation Omega hydraulic cross key installer, however, was produced in approximately 2006. The second generation Omega hydraulic cross key installer was produced and supplied to several BNSF locations, including Vancouver, Seattle, Tacoma, Spokane, and Everett. Ultimately, the second generation Omega hydraulic cross key installer was shipped to and received by BNSF in Pasco during the 2010 - 2011 period. But even though the Omega hydraulic cross key installer was tested once successfully at Pasco, it was

never fully put into use at Pasco because, according to BNSF, local BNSF management attempted to develop a unique hydraulic power source at Pasco which was different from hydraulic power sources employed by BNSF at other locations where use of the Omega hydraulic cross key installer had already been implemented.

Plaintiff contended the absence of an Omega hydraulic cross key installer in December of 2009 contributed to cause his right shoulder injury. Plaintiff contended that if the Omega hydraulic cross key installer had been provided and put into use at BNSF's Pasco facility before December 2009, Plaintiff's injury would have been averted because manual hammering on a 55 lb. cross key with a 12 lb. sledge hammer would have been entirely unnecessary and, thereby, eliminated. The hydraulic cross key installer - instead of Plaintiff's manual hammering with the 12 lb. sledge hammer - would have been employed for installing the difficult cross key and would have completed the job.

Plaintiff, however, was critically handicapped in presenting his case to establish BNSF's negligence by failing to provide and initiate use of the Omega hydraulic cross key installer at BNSF's Pasco facility before December of 2009. The trial court sustained BNSF's Motion in *Limine* No. 13 and precluded Plaintiff from calling retired BNSF Supervisor Robert Russell, who had been

integrally involved with Omega in developing both the first and the second generation Omega hydraulic cross key installers. BNSF Supervisor Russell initiated the successful use of the second generation Omega hydraulic cross key installer at BNSF's Vancouver facility in approximately 2006, before Russell retired from BNSF in 2008. By sustaining BNSF's Motion in *Limine* No. 13, the trial court also precluded Plaintiff from offering any testimony from current BNSF carmen Ed Holm and Andrew Pillar, who had been using the second generation Omega hydraulic cross key installer successfully at BNSF's Seattle Washington repair track for years. The trial court also sustained BNSF's Motion in *Limine* No. 5 and excluded Plaintiff's Exhibit 14 - a BNSF Job Safety Analysis for Zone 1 - which was evidence of and an admission by BNSF that BNSF had accepted, adopted and recommended the Omega hydraulic cross key installer as a recognized alternative - to the sledge hammer - for installing cross keys. The exclusion of this crucial evidence allowed BNSF to portray the second generation Omega hydraulic cross key installer as only an unproven and unused "prototype", still in development, rather than a piece of equipment that BNSF had - itself - already recognized, and used, as an established, alternative means for installing cross keys.

At the conclusion of the evidence and after jury arguments, the jury was provided with a special verdict form. After deliberating, the jury returned with a special verdict that BNSF was not negligent. The jury did not reach and did not decide any of the other special issues (e.g., causation, sole cause, contributory negligence, damages, mitigation of damages, etc.) presented at trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining defendant BNSF's Motion in Limine No. 13 and excluding Plaintiff's proposed witnesses Robert Russell, Ed Holm, and Andrew Pillar and further sustaining defendant BNSF's objections during trial to Plaintiff calling Robert Russell, Ed Holm, or Andrew Pillar as witnesses at trial.

2. The trial court erred in granting and sustaining defendant BNSF's Motion in Limine No. 5 and excluding Exhibit 14, the BNSF Job Safety Analysis ("JSA") for the hydraulic cross key pusher (a/k/a Omega hydraulic cross key installer) from evidence and sustaining objections to testimony about this JSA..

3. The trial court erred in overruling and denying Plaintiff's Motion for New Trial Pursuant to Rule 59.

III. STATEMENT OF THE CASE

Cross keys are a component of railroad freight car couplers. The E-style cross key is 17" - 19" in length, 6" wide, and 1 - ¾" thick. (T. P111: L25 - P112:10) The E-style cross key weighs 53 - 55 lbs. (T. P112: L17-21)

The cross key secures the coupler to the freight car by being inserted through the slots in the coupler and in the freight car draft sill. (T. P132: L7-9) The "cross key is what basically holds everything together." (T. P69: L24-25) There was a consensus that the majority of cross keys can be installed by hand, either with or without lubrication. There was also a consensus that a percentage of cross keys cannot be installed by hand because they bind. The frequency with which cross keys bind was the subject of differing testimony. The BNSF carmen who worked at the Pasco freight car repair track from the 1990s until trial testified approximately 30% of the cross keys could not be installed by hand, but rather had to be driven into place with a sledge hammer. (T. P78: L1-4; T. P 113: L11-12) Plaintiff's personal experience was that 40% of the cross keys could not be installed by hand. (T. P240: L10) But at 6'-5" and 235-260 lbs., (T. P231: L2-4) Plaintiff was the physically largest carman in the shop who could swing a sledgehammer and, as a result, was asked by others "quite a few times" to help install their

difficult cross keys. (T. P243: L17-25) The two BNSF Supervisors (Joe Long and Ryan Risdon) testified that 90% of cross keys were installed by hand or with "just a tap". (K. P16:11; K. P58: L8-15) These two BNSF supervisors had only recently arrived at BNSF's Pasco facility (Long in 2009, K. P49; Risdon in May of 2010, K. P 60: L6), and neither of the supervisors had ever worked as a carman at the Pasco repair track. Indeed, Supervisor Long's assignment at Pasco during 2009 had been train yard foreman (K. P 49: L1-2) and not at the repair track. Tim Cousineau was the Pasco repair track supervisor in 2009. (K. P43: L3-4) Cousineau did not testify by deposition or live at trial.

Friction is the reason cross keys can be difficult to install and cannot be installed by hand. (T. P128: L6) There are three separate steel/metal surfaces involved, (T. P128: L4) each of the components is cast material, (T. P129: L14) and they are not machined parts. (T. P129: L15) Machined parts "have an exacting tolerance" and provide "a perfect fit." (T. P129: L15-16) In contrast, cast materials are "bead blasted" leaving a rough surface and lack the perfectly smooth surface of a machined part. (T. P129: L17-18) The cast parts have "rough imperfect surfaces". (T. P133: L15-16) So with these rough and imperfect surfaces, there is friction, which causes the parts to bind. (T. P133: L15-23) Misalignment is also a

problem. (T. P78: L8-16; P129: L20-21) When a cross key binds at Pasco - whether 10%, 30%, or 40% of the time - it is driven into place with a sledge hammer.

Plaintiff worked with BNSF carman Kevin Lee Schroeder as a partner on the Pasco repair track for nine years on the same shift. (T. P 63: L6-7) They changed a lot of couplers and did a lot of cross keys on the repair track. (T. P76) Removing and installing cross keys was "definitely a big part of the job." (T. P 62: L 24) Typically, they would change 4 to 8 cross keys per day. (T. P 77: L1-2) Some days they would do 10 cross keys; other days they would do only 2. (T. P 77: L3-4)

BNSF provided Plaintiff and the other carmen at the Pasco repair track with a Job Safety Analysis ("JSA") for replacing cross keys. BNSF Carmen Kevin Schroeder identified Plaintiff's Exhibit 13 testifying, "[t]hat is a JSA, a Job Safety Analysis. The railroad has one for most everything we do. And basically it's a sequence of steps on how to install or you know take apart whatever you happen to be working on." (T. P 63:L18-21) Plaintiff's Exhibit 13 was for cross key replacement. (T. P 63: L 22) This JSA, dated 8/15/00, revised 8/29/06, last updated 9/21/07, and approved by BNSF Pasco Repair Track Supervisor Tim Cousineau, dealt with the specific job task of "X-key Removal/Reinstall". (CP723) Under

the title "Sequence of Job Steps", step 5 was "Replace Cross Key". (Exhibit No. 13) The explicitly recognized "potential hazards" were identified as "potential pinch point, back strains & sprains." (Id.) And the "safe recommended action or procedure" was to "position cross key on top of train line [and] use sledge hammer to drive cross key through draft sill." (Id.) BNSF's JSA, thus, recommended driving a cross key into place with the sledge hammer at Pasco as the "safe recommended action or procedure".

Plaintiff began his employment with BNSF in 1994 and had worked at Pasco during his entire BNSF career, up until the time of trial. (T. P231:6-8) As such, Plaintiff and the other BNSF carmen (Schroeder, David Fox, and Bert Barnes) who had worked continuously at Pasco from the 1990s to the time of Plaintiff's 2009 right shoulder injury, described the change that had taken place in removing and installing cross keys. During the 1990s, BNSF provided heavier 16 lb., 18 lb., 20 lb., and 22 lb. sledge hammers for use at the Pasco repair track (T. P69: L1-14; P116: L1-20; P234: L4-8) providing the carmen a choice of sledge hammers to drive in cross keys. These heavier sledge hammers performed better and were superior to the lighter 10 lb. and 12 lb. sledge hammers that BNSF provided at the time Plaintiff was injured. (T. P117: L4; L15-16; P134: L6-9) The "heavier hammer creates more force." (T.

P70: L2) The heavier sledge hammers provided more momentum striking the cross keys. (T. P117: L3) The greater the mass impact on the cross key, the quicker and easier it drives through. (T. P72:3-4) The heavier sledge hammer was swung fewer times to drive in cross keys. (T. P117: L2-3) Rather than hitting the cross key 100-150 times with the little sledge hammer, the heavier sledge hammer took less time and was easier. (T. P70: L3-5) The heavier sledge hammer just took less effort. (T. P70: L1) And the heavier sledge hammers did not have vibrations nearly as bad (T. 79: L 22-23) and did not rebound nearly as bad (T. P161: L3-6; P239)

In the late 1990s, however, BNSF management took away all sledge hammers that were heavier than 12 lbs. at Pasco. (T. P72: L11-13) The 16 lb., 18 lb., 20 lb. and 22 lb. sledge hammers were all taken away. (T. P72: L14-16) A couple of foreman showed up at Pasco and confiscated all the hammers. (T. P 237: L 19-21) This happened at other BNSF locations as well. Jeff Neufer, who was a BNSF carman and then a supervisor at Vancouver until 2004 when he transferred to Pasco, remembered that they stopped using those bigger sledge hammers at Vancouver. (T. P1 98: L7-10). The carmen were told they could not use them anymore, and BNSF took the heavier sledge hammers off the shop floor. (T. P198:11-13) The same thing happened on the BNSF at Kansas City. (K. P 13:5). The

big hammers were all taken away "in the late 90s". (K. P 13:5) This was done "systemwide on the BNSF". (K. P 13:8) BNSF systemwide mechanical made that call. (K. P 13:24-25) BNSF supervisor Ryan Risdon also recalled the larger sledge hammers being taken out of service. (K. P 59:12-15) There were safety briefings about it at his shop. (K. P 59) Risdon also explained that BNSF has a larger body that governs the tools and equipment that can be used on BNSF. (K. P 60:23-24) There is a BNSF catalog that allows them to procure or purchase only certain specific types of tools, and Pasco local management is "limited to that." (K. P 60:24-61:1) The BNSF safety department also weighs in on the catalog of tools that are approved. (K. P 61:6-8) BNSF has "a systemwide mechanical department safety administration, and we also have a hand and power tools team that authorizes the types of tools that we can buy." (K. P 61:8-10) Because these policies are set systemwide, Risdon cannot go out and buy a 20 lb sledge hammer and provide it to an employee. (K. P60: 20-21; P61:1-2) As Risdon testified, "[s]ure I could go down to Ace Hardware and buy one, but I would be violating our tool procurement policies." (K. P61:3-5) BNSF Assistant General Foreman Joe Long also acknowledged that decisions about the types of tools and equipment that could be used were made systemwide, not locally.

When asked whether he could respond to a complaint about not having a heavier, 20 lb. sledge hammer, Long testified "that's above my pay grade. That was system safety, mechanical that made that call." (K. P 13: L 19-P 14: L2) Decisions made on these issues were made systemwide on the BNSF, not locally at Pasco. Evidence from the two BNSF Supervisors suggested BNSF systemwide mechanical safety had confiscated the heavier sledge hammers in the late 1990s because of a perceived risk of back injuries. (See, K. P14: L6-8; K. P59-60) Risdon testified "there was a lot of back injuries associated with the heavier sledge hammer." (K. 59: L18-19)

After the heavier sledge hammers were confiscated and the carmen only had the lighter weight 10 lb. and 12 lb. sledge hammers to use, this made the job of driving in cross keys a lot harder, (T. P73:17-18) and the carmen considered themselves to be "handicapped" in doing their jobs (T. P73: L18, P74:18) because they took away a tool they really needed and that made the job easier. (T. P74: L15-16) This resulted in a "night and day difference" in the amount of physical exertion involved in driving in cross keys. (T. P238: L21-22) The difference with the smaller sledge hammers was "astronomical". (T. P239: L3-5) Plaintiff explained the reduction in weight of the sledge hammers changed

the way the sledge hammers were swung. (T. P239) They called it "getting deeper in the well." (T. P239: L8-9) This meant pulling back deeper, swinging harder, and getting more speed on the end of the sledge hammer (T. P239: L9-10) to transfer more energy to the cross key. (T. P239: L11-12) Because of their bigger mass, the larger hammers did not require so much speed to do the same amount of work. (T. P239: L12-14) The effect on the body was straining harder, swinging more often, at a faster pace, (T. P239: L 14-17) that resulted in "a lot of jarring." (T. P239: L 19-20) And the smaller sledge hammers rebounded bad compared to the bigger ones. (T. P239: L 16-17) The primary effect was to make Plaintiff's shoulder sore (T. P239: L 22) as well as affecting other parts of his body.

The primary effect of confiscating the heavier sledge hammers was making the work much more difficult, harder, and causing the carmen soreness. The secondary effect was that the Pasco carmen complained to BNSF management about having the larger, heavier sledge hammers taken away. Kevin Schroeder complained to his frontline BNSF supervisors at the Pasco repair track (T. P73: L5-6) These BNSF supervisors were Tim Cousineau and Leroy Manion. (T. P 74: L7-12) Schroeder complained that BNSF had taken away a tool that "we really need", a tool that

"makes our job easier", and a tool that was "easier on our bodies." (T. P74: L 15-16) Included among Schroeder's complaints about the 10 lb. and 12 lb. sledge hammers (see, T. P79-80) was that they were now breaking the wooden handles of the lighter weight sledge hammers, and that metal had fragmented off and injured at least one person. (T. P79: L22-P80: L13) But Schroeder received no satisfactory response to his complaints to BNSF Pasco management. (T. P75: L1-3; 16-18; P80: L14-21) And it was not just Schroeder who complained, "there was a lot of people that complained." (T. P100: L17-18) David Fox also complained to his BNSF Pasco supervisors. (T P123) Fox complained and told the supervisors of the risks involved using the lighter hammers. (T. P124: L16-18) Fox and his fellow carmen asked that the heavier hammers be returned, (T. P1 24: L1) but they "were told it was not going to happen" (T. P124: L1-2) and "that the 10 and 12 pound sledge hammers were what we had. That is what we were to use." (T. P124: L21-22) Plaintiff also complained. (T. P2 38: L3-4) Plaintiff even complained to Ron Berg, the BNSF Seattle General Foreman, and Vern Peterson, the BNSF Vancouver General Foreman, who came to Pasco and removed the hammers from the facility, (T. P2 38: L6-10) and who "gave us [the BNSF Pasco

carmen] the 10 and 12 pound hammers and said, these are what you are required to do the job with." (T. P2 38: L 14-15)

And the complaints about confiscation and removal of the heavier sledge hammers from service were not just limited to BNSF's Pasco facility. Jeff Neufer, who worked as a carman and later as a foreman for BNSF at Vancouver until 2004 when he transferred to Pasco, testified that complaints also were made at Vancouver in the late 1990s when the 16 lb., 18 lb., 20 lb., and 22 lb. sledge hammers were taken away. (K. P 184: L 10-20) These complaints at Vancouver prompted BNSF General Foreman Vern Peterson to assign BNSF Foreman Robert Russell "to find some kind of method to install cross keys. [Vern Peterson] did not like using the sledge hammers." (T. P185) "[A]ll the carmen were complaining . . . [about] . . . the vibration and recoil from using smaller sledge hammers, it was tougher driving in the cross keys." (T. P186 1-3) BNSF's Peterson wanted Bob Russell to get with Omega and come up with a design to install the cross keys. (T. P187: L 20-21) Russell got with Omega and did so, but "the first one they came up with didn't work very well and I know that Bob [Russell] went back to Omega and said that it wouldn't work and had them working on something else." (T. P187: L 24-P188: L2) Jeff Neufer knew that "[t]hey [Russell and Omega] **came up with a new**

design but that was after I came to Pasco is when they put that in to work." (T. P188: L2-4) And, as mentioned above, Neufer transferred to Pasco in 2004. (T. P184: L2) Jeff Neufer - as explained above - had personal knowledge of the carmen complaints about driving in cross keys with small sledge hammers at Vancouver as well as the initial efforts by BNSF's Russell and Omega which culminated in the unsuccessful first-generation hydraulic cross key installer that only worked on approximately 50% of the freight cars. (T. P207: L6-13) Neufer also knew they came up with a new design, but Neufer left Vancouver in 2004 and "didn't see that one" at Vancouver and "don't know what percentage" of railcars it worked on. (T. P207: L14-18) So, Neufer was unable to testify about the efficacy of the second generation Omega hydraulic cross key installer.

The trial court's rulings on BNSF's Motion in *Limine* Nos. 5 and 13 had the effect of truncating the evidence concerning the development of the second-generation Omega hydraulic cross keys installer at Vancouver in 2004. There was a 6-7 year gap or interval (i.e., *circa* 2004 - 2010) about which the jury heard no evidence concerning the development of the second-generation Omega hydraulic cross keys installer. Then the jury heard the BNSF Pasco repair track received an Omega hydraulic cross key installer in 2010

or 2011. (See, T. P162) Although on the premises at Pasco for years, the cross key installer still had not been put into use at the time of trial. (K. P339: L19-23; T. P244: L22-25) Rather, it sat in a corner. (T. P167: L10) Jeremy Putnam, a Pasco repair track carmen, testified the Omega hydraulic cross key installer had been received at Pasco "[t]wo and a half, three years" before trial. Approximately a year prior to trial (T. P162: L10), Putnam, his repair track partner, Mike Elgin, BNSF General Foreman Ryan Risdon, BNSF Assistant General Foreman Joe Long, and BNSF Pasco Safety Assistant Kelly Zimmerman tested the device. (T. P162: L4-P163: L 11) BNSF repair track supervisor Tim Cousineau was also there for a test. (K. P33: L1-4) During the test, the mechanical installer worked on the one particular car (K. P33: L 14-15) and pushed the cross key through the draft sill. (K. P33: L 18-20). But BNSF Assistant General Foreman Joe Long has not seen it used before or since, although he did not know why. (T. P33:16-24) BNSF General Foreman Ryan Risdon testified that "we have done some work on that tool". (K. P67: L 20-21) They had to figure out how it worked. (K. P67: L 22-24) The BNSF Pasco supervisors had taken "the existing job safety analysis **I believe from we borrowed it from Seattle**." (K. P 69: L 12-14). There was development of a JSA also. (K. P 70:01) BNSF Pasco Safety

Assistant Kelly Zimmerman also created a step-by-step process to sequence the basic job functions. (K. P 70: L2-3) This was "**mirrored off of the one [JSA] that we borrowed from Seattle**". (K. P 70: L3-4) Risdon testified he then put the tool in limited supervised use where [Risdon] was comfortable with that process. (K. P 72: L 18-19) Risdon wanted to put it in a working **prototype** phase and see how it functioned, (K. P 72: L 20-21) but Risdon required that a supervisor must be involved and the safety assistant on duty. (K. P 72: L 21-23). So the Omega second generation hydraulic cross key installer was used "a couple of times". (K. P73:1-2) But basically sat in the corner collecting dust. (K. 39: L19-23; T. P244: L22-25)

As a consequence, however, of the exclusion of Plaintiff's Exhibit 14, the BNSF Zone One Job Safety Analysis "Hydraulic Cross Key Press" and witnesses Robert Russell, who was integrally involved in developing the hydraulic cross key installer at BNSF's Vancouver facility, and witnesses Ed Holm and Andrew Pillar, BNSF carmen who actually used the Omega hydraulic cross key installer at Seattle, BNSF was able to present an incomplete and distorted account of the development of the hydraulic cross key installer. Rather than a working device that BNSF had used for several years and even explicitly approved for use with its BNSF

Zone 1 JSA, (CP725-727; Exhibit 14) BNSF was able to portray the Omega hydraulic cross key installer as an unproven "prototype". Rather than equipment that multiple BNSF repair tracks had already successfully used, but which Pasco had been slow to adopt, BNSF was able to portray the Omega hydraulic cross key installer as a work in progress "prototype" whose bugs were still being worked out at Pasco. Indeed, "prototype" became BNSF's defining theme during the trial and mentioned repeatedly by both defense counsel and BNSF's witnesses. (See, e.g., T. P201: L4-5, P207: L6-9, P 216: L13, P216: L17, K. P32: L15-19, K. P42: L21-22, K. P43: L13, K. P139:5, T. P460, T. P461, T.P462) And manifestly BNSF's "prototype" theme – given the truncated evidence that the jury heard – was effective and persuasive because at the conclusion of BNSF defense witness Joe Long's testimony, a jury question directed to him and his answer were:

Q: Is the cross keys pusher **still** considered a **prototype**?

A: **Yes**.

(K. P51: L 15-18) The jury got BNSF's point: the Omega hydraulic cross key installer was still in development, still experimental, and was not a viable alternative method or piece of equipment to the 10 lb. and 12 lb. sledge hammer, because BNSF

was still working on it. But BNSF was only able to portray the Omega hydraulic cross key installer as a "prototype" because of erroneous trial court rulings on defendant's Motion in Limine excluding crucial evidence.

III. THE COURT'S IN LIMINE AND EVIDENTIARY RULINGS.

1. Trial Court's Exclusion of Exhibit 14 (Motion in Limine No. 5).

Defendant BNSF moved, in *limine*, to exclude the BNSF Job Safety Analyses or JSAs. (Clerk's Papers, CP 730-731, Par. 5) BNSF objected that the JSAs, generally, should be excluded pursuant to Rules 401, 402, and 403 E.R. (*Id.*) No other objection was raised by BNSF in its motion in *limine*. The only explanation/ground stated by BNSF in support of its objections was that "[s]ome of these **documents** exist in working or "draft" form only, and have not been or were not put into use." (*Id.*) BNSF set forth no other ground or basis for exclusion in its motion, although BNSF also stated "such testimony would be confusing and necessary explanations that result would be a waste of the jury's time." (*Id.*) No other legal ground of objection nor rationale for exclusion was presented by BNSF. And BNSF did not, in any fashion, attempt to distinguish between any of the JSAs, e.g., Exhibits 13 or 14. (*Id.*) Notably, moreover, BNSF did not contend

that any of the JSAs were not authentic or had not been authored and published by BNSF. (*Id.*)

Plaintiff's Response on this issue was developed in greater depth and detail than BNSF's No. 5. (See, CP 704-706) Three JSAs – including Exhibit 14 – were attached to Plaintiff's Response. (see, CP 725-727, for Exhibit 14) Plaintiff's Response also explained that the JSAs were BNSF documents containing a step-by-step, sequential job procedure for performing a particular work task. Plaintiff explained the JSA procedure had been used by BNSF since approximately 1990 and included the BNSF approved "Recommended Action or Procedure" for the job task. (CP 705) Plaintiff's Response also explained that "BNSF JSAs exist on BNSF's computer system, where they can be accessed systemwide. So, BNSF supervisors and employees in Pasco can access, via computer, BNSF JSAs prepared in Seattle and 'vice versa'." (CP 705) And Plaintiff's Response explained Exhibit 14 was "the BNSF JSA-Zone 1 [that] describes the **alternative method** of using a "Hydraulic Cross Key Press" (a/k/a the hydraulically powered cross key installer), describes the use of the method, which is the alternative to the sledgehammer method." (CP 706, bold in original) Exhibit 14 was not only a BNSF admission that the Omega hydraulic cross key installer was an alternative

means for installing cross keys, but the legal significance of an "alternative method" under the FELA, as considered by the US Supreme Court in *Stone v. New York C. & St. L. R Co.*, 344 US 407, 73 S. Ct. 358 (1953) and *Seeberger v. Burlington Northern Railroad Company*, 982 P.2d 1149 (Wash. banc 1999), had already been extensively discussed and explained in Plaintiff's Response. (*see*, CP 693-701) Nowhere on the face of Exhibit 14 was there any indication it was a "working" or a "draft" document only. (*see*, CP 725-727) Rather, it was a JSA for Zone 1, which included Pasco. (T. P43: L25) Exhibit 14 was, furthermore, expressly applicable to the craft of "Carmen", Plaintiff's craft. (CP725) This JSA, dated 6/27/2011, had been created by the "Zone 1 Safety Committee & Mike Blackwell". (CP725) Mike Blackwell had been a BNSF General Foreman in Zone 1 at Havre, Montana. And BNSF General Foreman Risdon testified BNSF's Pasco Safety Assistant, Kelly Zimmerman, had been actively involved with the other Safety Assistants in Zone 1 precisely on this issue. (T. P69: L2-16; P70: L1- P72: L20) Exhibit 14 also expressly confirmed, on its face, that **it had gone through the BNSF approval process and been approved** by BNSF Managers Emory W. Connor (now deceased) and Christopher M. Schilreff. (*See*, CP 725) Nothing on the face of Exhibit 14

indicated that it – or the piece of equipment it concerned, the Omega hydraulic cross key installer – was a draft, tentative, experimental or merely a "prototype". (See, CP 725-727)

Defendant's Reply in Support of its Motion in *Limine* No. 5 was again brief, only one paragraph. (CP 637, Par. 5) BNSF reiterated its "draft" contention. BNSF also contended Exhibit 14 was "not in effect at the time" of plaintiff's injury or shoulder surgery and was not "in effect at BNSF's Pasco repair facility." (*Id.*)

At the hearing on the motion in limine, the following positions were presented:

MR. ROGERS: This is regarding particularly a job safety analysis sheet that was created a year after Mr. McFarland had his surgery. **This document was created in June 2011**. This document has no relevance whatsoever to the conditions, the alleged conditions that created Mr. McFarland, right shoulder condition. Plaintiff in his response made reference to prior job safety analysis from 1999 and 2000. Our motion does not pertain to those JSA's. **It's in regard to the 2011 version**.

THE COURT: So your motion is only to 2011 version.

MR. ROGERS: Correct. It was no[t] in existence at the time of this case, any issue in this case.

MR. RUDD: I think it addresses an issue that's been shown is going to be raised as to **whether that hydraulic cross key pusher was an effective tool that was used by the railroad**. Hydraulic cross key pushers that we are talking about it was **developed and first disseminated at some point to BNSF in 2006** and **used at those locations**. They actually had a job safety analysis that was performed and was published in 2011 that said that that was the method that should be used at locations, use the hydraulic cross key pusher.

Their contention is that it doesn't work I guess is what they are going to say. That the hydraulic cross key pusher is like that electric knife that nobody uses. But on the other hand here they are **five years after they've already put that cross key pusher into production and use in places. They have a job safety analysis that says that is the way to do it**.

MR. ROGERS: Your Honor, that document does not say that this cross key installer should be used. **It just provides steps to use it if one elects to use it**. Again, **this document was not used in Pasco**, was **not in existence** at any time before plaintiff claims he was injured or at the time of his surgery in 2010.

THE COURT: I'm going to grant number five.

(T. P27: L 20-P29: L7; emphasis supplied) As the above quoted proceedings indicate, there was never any dispute that Exhibit 14 applied to the Omega hydraulic cross key installer which had been put into use at BNSF locations in 2006. Similarly, there was no contention the second generation Omega hydraulic cross key installer referred to in Exhibit 14, the JSA, was different in design or operated differently, in 2011, than it had been in 2006. And, furthermore, BNSF agreed that Exhibit 14 "provides steps to use [the hydraulic installer] if one elects to use it", **meaning, that BNSF had recognized that the second generation Omega hydraulic cross key installer was an alternative method - to the 12 lb. sledge hammer - for installing difficult cross keys**.

The JSA was addressed yet another time during the motion in *limine* hearing (see, T. P43: L22 - P46: L17) The trial Court reiterated his ruling stating "My ruling will stand for now. I'm not

going to say I will look at it later to see what evidence comes in." (T. P 46: L 15-17) Exhibit 14, however, was offered and evidence and excluded. In addition, when counsel attempted to cross examine defense witness, Pasco General Foreman Ryan Risdon, over the existence of a Job Safety Analysis for the hydraulic cross key installer, defense counsel objected as follows:

> MR. SCARP: Your honor, I think we've been through this, subject to motion in *limine*.
>
> THE COURT: Sustained.

(T. P143: L 12-15) On BNSF's motion and objections, the trial court excluded all offered evidence which established BNSF had adopted a JSA which recognized the Omega hydraulic cross key installer was a BNSF accepted alternative means for installing cross keys.

2. The Trial Court's Exclusion of Witnesses Robert Russell, Ed Holm, and Andrew Pillar. (Motion in Limine No. 13)

Defendant moved in *limine* to exclude various witnesses plaintiff indicated he intended to call to testify in the case. (CP736, Par. 13). BNSF's motion contended that although discovery had been continued several times and closed on June 3, 2013, plaintiff, "nearly a month later", e.g., June 24, 2013, had listed and disclosed Ed Holm, Andrew Pillar, and others as rebuttal witnesses and, also, listed Robert Russell in the Trial Management Report. (*Id.*) BNSF

set forth the names of the nine witnesses listed by plaintiff and moved to exclude these witnesses, stating:

> Plaintiff should be prohibited from offering any **expert** witnesses not timely and properly disclosed. See ER 401-403; Local Rule 4 (h)(1)(D); *Allied Fin Servs. v. Nangum [sic: Mangum]*, 72 Wn.App. 164, 168 (1993) (discussing exclusion of witnesses resulting from nondisclosure).

(CP736, bold supplied). The explicit focus of Defendant's motion was on expert witnesses, not lay witnesses. Nonetheless, Plaintiff's Counsel responded to defendant's motion, generally, stating in part:

> BNSF's contention, however, ignores crucial, well developed principles guiding this area of the law. First, merely innocent or inadvertent failure to comply with a deadline is not grounds for exclusion of witness testimony. Unless intentional, tactical, willful or otherwise unconscionable non-disclosure occurs, witness testimony should not be excluded. As the Court of Appeals has recognized:
>
> > A trial court should **not** not exclude testimony **unless** there is a showing of **intentional** or **tactical** nondisclosure, of **willful** violation of a court order, or the conduct of the miscreant is **otherwise unconscionable.**
>
> *Barci v. Italco Aluminum Corp.*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974) (Emphasis supplied). And furthermore, the Court has stated:
>
> > When a trial court does exercise its discretion to sanction a party, the sanction imposed should be the **least severe** sanction that will accomplish the purpose of the particular sanction given. Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). It must be apparent from the record that the trial court explicitly considered whether a **lesser sanction** would have been appropriate,

> and that it **found** that the refusal to obey a discovery order was **willful** or **deliberate and substantially prejudiced** the opponent.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). *See also, Blair v. Seattle East T-A No. 176*, 150 Wn. App. 904, 906-909, 210 P.3d 326 revd. 171 Wn.2d 342, 254 P.3d 797 (2011). None of these circumstances exist in this case. Late disclosure was not intentional, was not tactical, was not willful, was not deliberate, and was not unconscionable. Moreover, Defendant was not substantially prejudiced. Quite to the contrary, seven of the nine witnesses mentioned by BNSF were **formally** disclosed to BNSF on or before June 24, 2013, more than 7 weeks before the scheduled trial. This starkly contrasts to the *Magnum* case, cited by BNSF, where the offending party provided absolutely no list of witnesses and the Court Rule required disclosure of the witness lists 3 weeks before trial. Plaintiff did not completely fail to identify and disclose the witnesses in this case as the offending party did in *Magnum*. Moreover, Robert Russell, the BNSF supervisor who approached Omega Industries in 2001/2002 and requested that Omega begin development of the hydraulic powered cross key installer, was prominently mentioned during the April 24, 2013 deposition of George Apostolou of Omega Industries. Robert Russell's involvement in these matters was known by April 24, 2013. Moreover, Plaintiff's Lead Counsel, by letter, advised defense counsel of his desire to obtain Robert Russell's deposition on June 19, 2013. On that day, Plaintiff's Lead Counsel wrote to BNSF's Lead Counsel that:

> I would also **like to obtain the deposition** of Bob Russell, referred to by Mr. Apostolou at his deposition. Are you able to produce him or are you able to **provide me with his current address**?

BNSF's Lead Counsel on June 20, 2013 responded:

> Bob Russell...is away on medical leave and, therefore, unavailable.

> Plaintiff's counsel did not tactically, intentionally or wilfully not disclose Robert Russell as a witness. To the contrary, **Plaintiff's Lead Counsel was trying to obtain Russell's deposition with full knowledge of defense counsel.** This is the absolute antithesis of a party intentionally or deliberately trying to "hide" a witness. Quite to the contrary, this was Plaintiff's Lead Counsel loudly telling defendant "Robert Russell is a witness, I want to obtain his testimony".

(CP.711-714, Par 13, bold in original) In BNSF's Reply, Defense counsel's made absolutely no reference at all to Robert Russell; his name was not mentioned. (CP. 638-639) Nor was there any reference to plaintiff's efforts - mentioned in Plaintiff's Response, above - to locate Robert Russell or obtain his deposition. (See, *Id.*) Nor did BNSF address or provide any reason for responding, quite erroneously, that Russell was on "medical leave" and unavailable when this statement was manifestly not correct. (See, *Id.*) BNSF and its attorneys were silent on these issues. (See, *Id.*) Rather defense counsel again referred to Local Rule 4(h)(1)(D) as well as CR 26. Local Rule 4(h)(1)(C) does require a disclosure for "all witnesses" of the name, address and phone number and, for lay witnesses, "a brief description of the anticipated subject matter of the witnesses testimony". But, it was manifest that defendant had already received the functional equivalent of all the information Plaintiff was *able* to provide in this regard concerning Robert Russell. Robert Russell's identity as a BNSF supervisor at

Vancouver, Washington had been made known to both parties at the time of witness George Apostolou's April 24, 2013 deposition, (*see*, CP 544-565) assuming, solely for the sake of argument, BNSF did not already know this former BNSF Supervisor's role. Russell's role in the case, specifically his involvement in the development of the Omega hydraulic cross key installer, both first and second generation, had been revealed and underscored during the deposition of Omega's George Apostolou. (*Id.*) Plaintiff's intention/desire to obtain Russell's testimony also had been made known by Plaintiff's counsel through his discussions and correspondence with defense counsel, Jeremy Rogers. (*see*, e.g., CP 568, 580, 581, 582) These circumstances were known during April and May, 2013, several weeks before the close of discovery on June 3, 2013. (see, CP 544-563, 568, 580) Plaintiff's counsel did not know and, consequently, could not possibly inform or communicate to defense counsel the whereabouts (e.g., address and telephone number) of Robert Russell, because that information was unknown to Plaintiff and to his attorneys. (CP 581, 585-587) As for Ed Holm and Andrew Pillar, who both had been formally identified and disclosed seven weeks before trial, Defendant contended Plaintiff had not provided "purported subject matter of the testimony" nor "contact information" for these witnesses who were

defendant BNSF's carmen employees. (CP 638) In addition, defense counsel explicitly stated that "plaintiff has not set forth any plausible explanation of why he could not timely disclose these witnesses." (*Id.* bold supplied) Defendant BNSF contended plaintiff sought "an unfair advantage commonly referred to as trial by ambush." (CP 639)

At the hearing on BNSF's motion in limine (T. P34: L3-P39: L 14) BNSF's counsel initially reiterated the same position set forth in its motion. (*see*, T. P34: L3-P35: L3) Defense counsel emphasized the court's scheduling order had been extended more than once, and ultimately to June 3, but plaintiff disclosed seven rebuttal witnesses on June 24, 2013 and contact information had not been provided. (T. P 34: L10-24; T. P 35: L1) The court then specifically asked defense counsel (Rogers) about Robert Russell, and another witness named Harowicz. (T. P 35: L 11-12). Initially defense counsel (Rogers) contended that even though Russell and Harowicz had been listed as Plaintiff's witnesses in the Trial Management Report filed on August 6, 2013 (*see*, CP, 691, entries 26 and 27) that plaintiff was "not going to call those, I believe." (T.P35) Plaintiff's counsel (Rudd) immediately informed the court that was not correct, (T. P 35:16) and plaintiff's counsel (Friedman) stated: "Sure [plaintiff is going to call those witnesses]. Those

witnesses were disclosed to them. We even asked them to produce Mr. Russell for his deposition. They told us he was on sick leave and he wasn't available. They couldn't produce him." (T. P 35: L 19-22) The trial court then asked whether the discussions involving Russell were "prior to June 3". (T. P 36: L2-3) Plaintiff's counsel (Friedman) responded those conversations were either before June 3 "or perhaps shortly thereafter". The court then apparently first recognized that Russell and Harowicz were BNSF employees. (T. P 36:13-14) Plaintiff's counsel (Friedman) continued advising the court that Russell had been "disclosed when we took the deposition of this Omega individual [George Apostolou] that they're producing . . ." (T. P 36: L 17) Defense counsel (Rogers), in response, stated Russell had never been disclosed. (T. P 36:20-25) Defense counsel (Rogers) informed the court that discovery had been extended at least twice. (T. P 38: L6). Defense counsel (Scarp) then took the colloquy in a *different direction* by providing the trial court what Scarp described as "a little context". (T. 38) Scarp told the court the case had been continued "to depose lots of witnesses" but plaintiff did not depose the witnesses and then filed a supplemental motion to to permit plaintiff to disclose a rebuttal expert ergonomist witness, which motion was opposed by defendant, but granted by Judge Runge. (T. P 38: L 15-P 39: L 10).

During the entire hearing on motion in limine No. 13, (T. P34-P39) defense counsel did not allege or contend that BNSF had ever provided plaintiff's counsel with any contact information for Robert Russell, BNSF's former supervisory employee. Following the argument, the court stated: "I am going to take 13 under advisement. I will let you know in the morning." (T. P 39: L 11-12) Thereafter the court reiterated that "[e]xcept for number 13. I hope I have resolved most of them." (T. P 43:20-21) Manifestly, the trial court had not yet made any findings, on the record, on the *Burnet* factors.

The following morning, August 15, 2013, proceedings resumed in open court and the court addressed BNSF's motion in limine No. 13. The court noted that the case had been filed in January of 2012, that a scheduling order had been entered, that a first amended scheduling order had been entered (T 50: L 12-15). A second amended scheduling order had been entered (T. P 50: L 16-17) and that "another amended case scheduling order had been entered. (T. P 50: L 19-22) Based upon these explicit considerations, but **no express mention or discussion of any other factors**, the court stated:

> Given this record, it seems appropriate to grant defendant's motion in limine number 13. And that is granted.

(T. P 50:23-25). Further extensive argument on the issue was presented, which focused primarily on former BNSF supervisor

Robert Russell. (T. P 51-P 58:12) Among other things, plaintiff's counsel pointed out correspondence from May 7, 2013 confirming plaintiff's request to obtain the deposition Bob Russell. (T. P 51: L7-11) Plaintiff's counsel reiterated that the correspondence shows "We had been attempting to locate these people get their depositions and they were intended as witnesses in the case. Nothing is a surprise." (T. P 51: L 20-22) Then returning specifically to the development of the Omega hydraulic cross key installer and Robert Russell's role (see, T. P 53: L3-P 54: L 20) counsel emphasized that Russell's role had become apparent during the deposition of George Apostolou, in April and May. (T. P 53: L5-P 54: L 11) As Plaintiff's counsel (Friedman) emphasized at one point Robert Russell's name was quite prominent and had come up numerous times during the deposition of Omega's George Apostolou, specifically including on Pages 18, 20, 23, 24, 25, 26, 34, 39, 40, 42, 50, 58, 60, 61, 64, 80, and three times on page 84 of the Apostolou deposition taken on April 24, 2013. (T. P 56: L1-9) Robert Russell had been integrally involved in the development of the Omega hydraulic cross key installer and was the BNSF representative involved in this process and was a "key witness". (T. P54: L18) Defense counsel's (Scarp) response to Plaintiff's characterization of Russell as a "key witness" was that Russell "has

never been disclosed. Ever. Not in supplement, discovery continuations, never." (T. P 54: L 23-24) Defense counsel (Scarp) further stated, "we had asked when we hear about somebody, who are these people? Turns out. Mr. Russell has been gone from BNSF since 2008. **I've never heard of him**, never met him, never talk to him." (T. P 55: L 14-17) And defense counsel (Scarp) concluded stating, "So [plaintiff's counsel] has never disclosed [Robert Russell]. **We've never heard of him. We have no idea Mr. Russell**. THE COURT: My ruling stand. MR. SCARP: Thank you. (T. P 55: L 22-25) Plaintiff's counsel again sought to convince the court to reconsider its ruling. (*see*, T. P 56: L1-P 58: L3). Nonetheless, after this presentation, the trial court stated:

> THE COURT:I understand he is an **important witness** to your cause. I'm just indicating you were **not diligent** in getting notification to the counsel that he was going to be on your witness list, that he is a witness. That is very simple to do and you didn't do it. My ruling stands.

(T. P 58: L7-12; bold supplied)

Plaintiff's counsel had already specifically and expressly brought the "*Burnet* factors" to the trial court's attention, even emphasizing them in bold. (see, CP712) The trial court, however, made none of the *Burnet* factor findings on the record. From the record, it was apparent the trial court did **not** consider whether a lesser sanction would have been appropriate. Indeed, there was no

mention in the record of any sanction, other than exclusion of the witness testimony. Nor did the trial court find that the refusal to obey a discovery order was either "willful or deliberate". To the contrary, to the extent that a finding was made on this issue, it was that plaintiff was "not diligent", (T. P 59) markedly different from "willful or deliberate". And there was absolutely no finding on the record that BNSF would be "substantially prejudiced". To the contrary, the court expressly recognized that Robert Russell was an "important witness" to the *Plaintiff*. (T. P58)

3. Plaintiff's Post-Trial Motion for New Trial Pursuant To Rule 59 Wash. R.C.P.

Following the jury's special verdict of "no negligence" on BNSF's part, the trial court entered judgment on the verdict in favor of BNSF. Plaintiff timely filed Plaintiff's Motion for New Trial Pursuant to Rule 59 (CP 588-601) and Plaintiff's Memorandum of Law in Support of His Motion for New Trial Pursuant to Rule 59 CR (CP 534-543). Along with Plaintiff's Motion and Memorandum, plaintiff also filed Exhibit A, Notice of Presentation of Judgment (CP, 566-567); Exhibit B, plaintiff's counsel's (Friedman) May 1, 2013 letter to defense counsel (Rogers) concerning obtaining, *inter alia*, Bob Russell's deposition (CP 568-569); Exhibit C, Plaintiff's Supplemental Motion for Continuance of Trial Setting (CP 570-578); Exhibit D, plaintiff's counsel's (Friedman) May 22, 2013 letter to

defense counsel (Rogers) seeking, *inter alia*, Bob Russell's deposition (CP 579-580); Exhibit E, plaintiff's counsel's (Friedman) June 19, 2013 letter to defense counsel (Scarp) specifically seeking Bob Russell's deposition or his address (CP 581); Exhibit F, plaintiff's counsel's (Friedman) June 21, 2013 letter to defense counsel (Rogers) seeking to take the deposition of Bob Russell and Ed Holm and requesting the residence address of Bob Russell. (CP 582); Exhibit G, defense counsel's (Rogers) May 7, 2013 letter to plaintiff's counsel (Friedman), referencing, *inter alia*, Robert Russell (CP 583-584); Exhibit H, Affidavit of Dana McClanahan, investigator, describing the efforts that had been made by Plaintiff's counsel's office to locate Robert Russell (CP, 585-587); and Exhibit I, a condensed version copy of the deposition of George Apostolou taken by plaintiff on April 24, 2013. (CP 544-565)

Plaintiff's Motion for New Trial Pursuant to Rule 59 (CP 588-601) and Plaintiffs Memorandum of Law in Support of His Motion for New Trial Pursuant to Rule 59 CR (CP 534-543) addressed, factually, the same issues that have been presented above under the heading "Statement of the Case" in Appellant's Brief and the legal issues set forth below in the "Law & Argument" portion of this Brief, and will not be repeated here, other than to say that plaintiff's counsel again attempted to draw the trial court's attention to the pertinent legal

authority, including *Barci v. Italco Aluminum Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974), *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), *Mayer v. Sto Industries, Inc.*, 156 Wash.2d 677, 132 P.3d 115 (2006), *Blair v. East T-A No. 176*, 150 Wn.App. 904, 210 P.3d 326 revd. 171 Wn.2d 342, 254 P.3d 797 (2011), and *Teter v. Deck*, 274 P.3d 336 (Wash. 2012) on the issue of excluding the witnesses and testimony from Robert Russell, Ed Holm, and Andrew Pillar. (CP 538-540) As for the trial court's sustention of BNSF's Motion in *Limine* No. 5 and exclusion of Exhibit 14 the JSA for the Omega hydraulic cross key installer (a/k/a "pusher"), Plaintiff directed the courts attention to Evidence Rules 401 and 403, *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002), *Erickson v. Kerr*, 125 Wn.2d 183, 883 P.2d 313 (1994)

The trial court did not schedule a hearing on Plaintiffs Rule 59 Motion, but rather overruled Plaintiff's Motion summarily.

LAW & ARGUMENT

A-1. Standard of Review: Exclusion of Witnesses Russell, Holm, and Pillar

A trial court has broad discretion to impose discovery sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115, 118 (2006) However, a trial court abuses its

discretion when it imposes the severe sanction of witness exclusion without considering and entering findings on the record as required under *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 933 P.2d 1036 (1997). *Blair v. TA-Seattle East No. 176*, 171 Wash.2d 342, 352, 254 P.3d 797, 802 (2011) In addition, a trial court should impose the least severe sanction that will be adequate to vindicate the discovery process, *Teter v. Deck*, 274 P.3d 336, 341 (2012) and abuses the court's discretion by imposing the unnecessarily harsh sanction of excluding witnesses because such sanctions affect a party's ability to present his case. *Blair v. TA-Seattle East No. 176*, 171 Wash.2d 342, 348, 254 P.3d 797, 800 (2011)

A-2. The Trial Court Abused Its Discretion By Entering Its Order Excluding Witnesses Russell, Holm and Pillar Without Engaging In The Required *Burnet* Analysis And Making The Mandatory *Burnet* Findings On The Record.

Exclusion of witnesses is considered a severe sanction and, therefore, the trial court is required to engage in the analysis and consider the factors recognized by the Supreme Court in *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 933 P.2d 1036 (1997). The *Burnet* analysis compels the trial court to consider lesser sanctions and, furthermore, the "court may only impose the least severe sanction that will be adequate to serve its purpose in issuing a sanction." *Teter v. Deck*, 274 P.3d 336, 341 (2012), *see also*, *Woods v. Hill*, No. 43824-1-II Court of Appeals, Div. II, March 25,

2014) And it is mandatory that the trial court's consideration of the factors actually be demonstrated on the record at the time the order excluding the witnesses is entered. The Supreme Court has been steadfast in its adherence to the principle that:

> when imposing a severe sanction such as witness exclusion, "the record **must** show three things - the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it."

Blair v. TA-Seattle East No. 176, 171 Wash.2d 342, 348, 254 P.3d 797, 800 (2011) (bold supplied) These "[f]indings regarding the *Burnet* factors must be made on the record." *Teter v. Deck*, 274 P.3d 336, 341 (2012) The analysis and the findings must come from the trial court, the appellate court cannot consider the facts in the first instance as a substitute for the trial court findings. *Blair v. TA-Seattle East No. 176*, 171 Wash.2d 342, 348, 254 P.3d 797, 800 (2011) And also, where a case has been decided on the merits - either by jury trial or summary judgment - after a *Burnet* violation has occurred, the Supreme Court has remanded for a new trial. *Teter v. Deck*, 274 P.3d 336, 343 (2012) Remanding for further findings by the trial court has been rejected. See, *Id.*, and *Blair v. TA-Seattle East No. 176*, 171 Wash.2d 342, 352 n. 6, 254 P.3d 797, 800 (2011)

As discussed and set forth on pages 23-31 of Appellant's Brief, above, and also in the trial court record/transcript (*see*, T.

P34-P39; P50-P58) and Plaintiff's Response to BNSF's Motion in Limine No. 13 (*see*, CP 711-714), plaintiff's counsel - not defense counsel - explicitly brought the *Burnet* factors to the attention of the trial court. The trial court took Defendant's Motion in *Limine* No. 13 under consideration over the evening break. Nonetheless, when the trial court addressed the matter on the record at the very beginning of the court session the following morning, the trial court presented no discussion of and made no mention of any consideration of any **lesser sanctions**. There is a complete dearth of any such discussion in the record/transcript. Nor was there any finding nor any discussion in the transcript/record to demonstrate that defendant would sustain **substantial prejudice** if its motion to exclude Russell, Holm and/or Pillar were overruled or a **lesser sanction** imposed. In addition, defense counsel did not submit and did not request the trial court to enter any contemporaneous written order or written findings addressing any of the *Burnet* factors. Nor for that matter, did the trial court, *sua sponte*, enter any contemporaneous written findings on the *Burnet* factors, although contemporaneous written findings of the trial court are a recognized, acceptable method for making the *Burnet* findings. The trial court did not comply with the mandatory requirements of *Burnet* and the multiple appellate opinions following *Burnet*.

The trial court did mention the multiple times the discovery schedule had been amended. (T. P50) But there was no express finding by the trial court that Plaintiff's delayed disclosure of Holm and Pillar until June 24, 2013 - three weeks late, but still seven weeks before trial - was deliberate. In fact, the trial court did not reference this at all. And even with regard to the later disclosure of Russell, the trial court did not find that the later disclosure was willful, but rather that plaintiff's counsel had not been diligent in listing them. "Not diligent" is not equivalent to nor a surrogate for "willful", for the same reasons that the Supreme Court recognized that a trial court's finding that a party has failed to show "good cause" for being so late in disclosing a witness is not an adequate finding of willfulness under *Burnet*. See, *Jones v. City of Seattle*, (Wash. December 12, 2013) citing *Blair II*, 171 Wn.2d at 350, n.3. In Jones, the Supreme Court stated the trial court:

> concluded that the City had not shown good cause for why [Gordon was] so late . . . Under Burnet, this is not an adequate finding of willfulness. This court may not supply a willfulness finding that the trial court omitted. *Blair II*, 171 Wn.2nd at 350 n. 3. We therefore conclude that the judge erred in excluding Powell and Gordon without conducting the **full** *Burnet* analysis.

Jones v. City of Seattle, (Wash. December 12, 2013)(bold supplied). In this case, the trial court did not conduct the full *Burnet* analysis, did not make the mandatory *Burnet* findings, did not

consider imposing a less severe sanction than witness exclusion that would not impair Plaintiff's capacity to present his case, and violated *Burnet*, and the verdict and judgment of the trial court should be reversed and the cause remanded for plenary trial.

B-1. Standard of Review: Exclusion of Exhibit 14.

Evidentiary rulings are reviewed for an abuse of discretion. *Cole v. Harveyland, LLC*, 163 Wn.App. 199, 213, 358 P.3d 70 (2011). A trial court abuses its discretion when the ruling is manifestly unreasonable or based upon untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010)

B-2 The Trial Court Erred and Abused Its Discretion By Granting Defendant BNSF's Motion In Limine No. 5, Excluding Exhibit 14 The BNSF Job Safety Analysis For Use Of The Omega Hydraulic Cross Key Pusher/Installer, And By Thereafter Sustaining Defendant's Objection To Plaintiff's Attempts To Cross Examine Defense Witness Ryan Risdon On This Topic.

Defendant BNSF moved in *limine* to exclude Plaintiff's Exhibit 14, the JSA instructing on the use of the Omega hydraulic cross key installer. The trial court did not disclose its basis for sustaining BNSF's motion on this point, nor did the trial court set forth, in the record, its legal grounds or rationale for this ruling. But BNSF's motion in *limine* raised only the stated legal grounds of relevancy, citing Evidence Rules 401, 402, and 403. Defendant BNSF cited no other evidentiary rules and no other legal authority in

its motion in *limine* to support its contention Exhibit 14 should be excluded. Defendant did not object nor contend that Exhibit 14 had not been authored and published by defendant BNSF. Nor did defendant object or contend that Exhibit 14 did not apply to the second-generation Omega hydraulic cross key installer.

Rule 401, "Definition of 'Relevant Evidence" provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Only a minimal showing is necessary to establish relevance under Rule 401. As the Supreme Court has described it, "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Evidence Rule 402, also cited by BNSF - in the context of this case, since no constitutional, statutory, or other provisions are in play - simply provides that all relevant evidence is admissible, and evidence which is not relevant is not admissible. Without belaboring the point previously made, (*see*, pp. 20-25, above) Exhibit 14 was relevant under Rule 401 standards on a crucial issue in this case because it was an admission of defendant BNSF that the second generation Omega hydraulic cross key installer was an effective tool to install cross keys. And, moreover, a jury that was

allowed to see, read and hear about Exhibit 14 could readily infer that BNSF would not have created a JSA instructing on the use of the Omega hydraulic cross key installer to install cross keys if it did not work or was merely an unproven "prototype". Indeed, this inference is compelling. And, indeed, that was precisely plaintiff's point in opposing BNSF's motion in *limine* a No. 5. (See, pp. 23 above)

Moreover, the legal significance of the Omega hydraulic cross key installer being an alternative method or alternative equipment to perform the job task of installing a cross key under the FELA is clear from *Stone v. New York C. & St. L. R Co.*, 344 US 407, 73 S. Ct. 358 (1953) and *Seeberger v. Burlington Northern Railroad Company*, 982 P.2d 1149 (Wash. banc 1999). Consequently, Evidence Rules 401 and 402, cited by defendant, established the admissibility, not the inadmissibility, of Exhibit 14.

Evidence Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Supreme Court has recognized that "ER 403 has a presumption in **favor** of the admissibility of relevant evidence and the burden of establishing unfair prejudice is on the party seeking

exclusion." *Erickson v. Kerr,* 125 Wn.2d 183, 190, 883 P.2d 313 (1994) Given the presumption in favor of admissibility, BNSF had the burden of bringing to the trial court's attention circumstances that would demonstrate that the probative value of Exhibit 14 - in establishing the hydraulic cross the installer was an effective means of installing cross keys - was substantially outweighed by one or more of the recognized factors listed in Rule 403. BNSF failed to discharge its recognized burden.

BNSF contended that Exhibit 14 should be excluded because it was only a "draft". But BNSF's "only a draft" contention was refuted on the very face of Exhibit 14. Nowhere on Exhibit 14 was there any designation whatsoever that it was a "draft". Quite to the contrary, the very face of Exhibit 14 demonstrated that it had been developed by the BNSF Zone One Safety Committee and Mike Blackwell and, furthermore, had gone through the BNSF **approval process** and received BNSF approval. BNSF's contention that Exhibit 14 should be excluded from evidence because it was a "draft" was entirely untenable on the record before the court at the time the motion was heard and decided.

BNSF's contention that Exhibit 14 should be excluded because it had not been adopted and put in effect at Pasco also entirely missed the mark. The defendant in this case was the

BNSF Railway Company, not BNSF-Pasco. Defendant did not contest and did not refute the fact that BNSF authored and published Exhibit 14, because BNSF had used the Omega hydraulic cross key installer. The fact that BNSF authored and published Exhibit 14 was, as a consequence, evidence that **defendant BNSF recognized that the Omega hydraulic cross key installer was an effective tool for installing cross keys**. Whether or not Pasco local BNSF management "adopted" Exhibit 14 or put Exhibit 14 "in effect" at Pasco does not alter the probative value of Exhibit 14 as an admission by defendant BNSF that the hydraulic cross key installer was **an effective tool**. The trial court could not rationally base its exclusion of Exhibit 14 on the rationale that local Pasco BNSF management had not "adopted" or "put in effect." Exhibit 14. This, again, would constitute a patently untenable ground for the exclusion of Exhibit 14.

The other rationale advanced by BNSF for excluding Exhibit 14 was that Exhibit 14 was "not in effect at the time" of plaintiff's injury or at the time of his shoulder surgery, because Plaintiff's injury had been in December 2009, shoulder surgery had been in June of 2010, and Exhibit 14 was prepared in June of 2011. Defendant's contention, however, conflates the legal significance of the date that the second generation Omega hydraulic cross key installer began

being used with the date that defendant BNSF authored and published the JSA which recognized it was being used.

The evidence, and the contentions of the parties, before the court tended to show that after the first generation Omega hydraulic cross key installer proved unsatisfactory in about 2002, work on the second-generation cross key installer was begun sometime prior to 2004, when Jeff Neufer transferred from Vancouver to Pasco. Plaintiff's counsel represented to the court that work on the second generation Omega hydraulic cross key installer had been completed by approximately 2006 and then disseminated and put into use at multiple BNSF locations. BNSF did not contest this chronology. There was no evidence of any further redesigns or modifications of the second generation Omega hydraulic cross key installer. Consequently, the tool/piece of equipment that plaintiff contended should have been provided as an alternative method/alternative tool to install cross keys existed and had been used by BNSF **before** Plaintiff's injury in 2009 even though the document, the JSA, recognizing that the Omega second-generation hydraulic cross key installer was a working and viable piece of equipment to install cross keys was authored and published by BNSF **after** plaintiff's injury. Under these circumstances, the fact that defendant's **admission** – that the second generation Omega hydraulic cross

key installer worked and was an effective piece of equipment – came **after** plaintiff's injury is of no import. Indeed, it is common that such an admission by a party opponent comes after the event, but that in no manner renders the admission irrelevant.

The trial court's sustention of BNSF's motion in *limine* No. 5 was an abuse of discretion. On the record before the court at the time the order was entered, there was no tenable basis, no tenable ground, and no tenable reason to exclude Exhibit 14 which plaintiff contended was admissible to prove that the second generation Omega hydraulic cross key installer was an effective piece of equipment to install cross keys and, therefore, a viable alternative to use of the sledgehammer. The trial court abused its discretion.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court and remand this case for trial.

Dated this seventh day of August, 2014

C. MARSHALL FRIEDMAN, P. C.

C. Marshall Friedman by Ken Rust
C. Marshall Friedman (pro hac vice)

CERTIFICATE OF SERVICE

I, C. Marshall Friedman, hereby declare that I caused to be served a true and correct copy of the foregoing Opening Brief of Appellant, by first-class US Mail delivery, to all parties named below.

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Dated this 8th day of August, 2014

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