No. 320669

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

BRENT W. McFARLAND,

Plaintiff/Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant/Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

The jury decided this trial on the merits of the case, based on facts that were properly before it; this case was not won or lost on the trial court's sanctions for plaintiff/appellant Brent McFarland's repeated defiance of witness disclosure rules. The issue at trial was straightforward: did McFarland prove by a preponderance of evidence under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, that BNSF Railway failed to provide a reasonably safe place to work when it equipped him with 12-pound sledgehammers—the industry standard tool—instead of a hydraulic press to install cross keys on railcars? The jurors unanimously answered "No." Now, McFarland covets another trial.

McFarland first admonishes the trial court for excluding three witnesses who were not properly disclosed—Robert Russell, Ed Holm, and Andrew Pillar—without considering the three-part test contained in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) (if a lesser sanction would suffice, if the violation was willful or deliberate, and if the opponent's ability to prepare for trial was substantially prejudiced).[1]

[1] Because the Court of Appeals cannot perform a *Burnet* analysis, BNSF resists the urge to address whether the facts in the record satisfy the test. *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 351, 254 P.3d 797 (2011) (holding that appellate courts cannot consider the facts for the first time to substitute the trial court's missing *Burnet* test.).

This does not provide the second bite at the apple that McFarland seeks. The trial court's failure to fully consider the *Burnet* factors was harmless.

McFarland claims that Russell "initiated the successful use of the second generation hydraulic press" in Vancouver, and that Holm and Pillar "had been using the second generation Omega [Industries, Inc.] hydraulic cross key installer[2] successfully at BNSF's Seattle Washington repair track for years."[3] First, the proposed testimony was cumulative to evidence presented at trial. There was simply no dispute at trial that (1) a hydraulic press had been developed before McFarland's injury in an attempt to develop a hydraulic alternative to sledgehammers, (2) a hydraulic press had been used at least sporadically at a few repair yards before McFarland's injury, (3) a hydraulic press was not made available at the Pasco repair track before McFarland's injury, and (4) a hydraulic press sat unused in Pasco after McFarland's injury. Second, the proposed testimony about the availability of the alternative tool would have been insufficient as a matter of law to establish negligence. Third, McFarland's insistence that Russell was a necessary witness is waived. McFarland

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[2] Witnesses referred to the machine as a "pusher," "hydraulic installer," etc. *See, e.g.*, RP Vol. I at 83–84, 158, CP 44, 52. This brief will generally use the term "hydraulic press."

[3] Opening Brief of Appellant at 5.

chose not to call *disclosed* witnesses for the same topic; thus, the trial court did not rule on the inclusion or exclusion of the testimony, and McFarland waived the argument that it was needed from Russell (or anyone else). Fourth, McFarland did not make an offer of proof at trial regarding Holm or Pillar's evidence, as required by ER 103(a)(2). Notwithstanding these enumerated reasons, the jury had ample basis to reject the premise of McFarland's entire case—that the use of sledgehammers had anything to do with his shoulder injury (see Section F, below).

Next, even though the incomplete *Burnet* analysis was harmless error, McFarland's patterned defiance of witness disclosure obligations justifies creating an exception to *Burnet* once the parties reach trial. This reasonable approach was suggested by Justice Gonzales' concurrence, joined by Justices Owens and Fairhurst, in *Jones v. City of Seattle,* 179 Wn.2d 322, 371, 314 P.3d 380 (2013), as corrected (Feb. 5, 2014), to "restore [witness exclusion] to the reasonable discretion of the trial court" at trial, when opposing counsel lacks adequate time to effectively cope with the new witnesses.[4]

[4] BNSF asks only that the Court address this policy argument if it disagrees that the exclusions were harmless error.

McFarland's second argument is that the trial court abused its discretion by excluding a 2011/2012 BNSF Job Safety Analysis ("JSA"), made a year and a half after his injury, which listed the steps and potential hazards involved in operating a hydraulic press (contrary to McFarland's assertion in his brief at page 5, the JSA does not "recommend" the hydraulic press). McFarland insists that the 2011/2012 JSA admits that the press "was an alternative means for installing cross keys." This argument fails for a handful of reasons. First, there was no question at trial that the press "was an alternative means for installing cross keys" at certain locations: multiple witnesses testified that it was. That moots McFarland's argument that this document needed to be admitted to establish that same point. Second, McFarland is wrong that the date of the document "is of no import." The excluded 2011/2012 JSA post-dates McFarland's injury, and the FELA is very clear that liability cannot be proven by alleged hindsight. Finally, the JSA was inadmissible on other grounds because he disclosed no witnesses to authenticate it.

McFarland's brief omitted the legal argument section for his third assignment of error (that the judge improperly denied his motion for a new trial). The third assignment of error should be disregarded accordingly.

ASSIGNMENTS OF ERROR

BNSF does not have any assignments of error.

STATEMENT OF THE CASE

Mr. McFarland felt pain in his right shoulder in December 2009, he claims, while swinging a sledgehammer to install a cross key. RP Vol. II at 248:8–250:4. He sued BNSF for negligence under the FELA. Trial began August 14, 2013. McFarland called eight witnesses: seven current or former BNSF employees and his treating physician. At the end of trial, the jury found that BNSF was not negligent.

1. Trial was full of testimony about sledgehammers and the hydraulic press.

Being a railcar mechanic (or "carman") is a physical, heavy-duty job. Among other things, carmen repair railroad freight cars. RP Vol. I at 59:16–24. Generally speaking, carmen have the same tasks across the BNSF system, whether they work in Kansas or Washington, but their tasks vary widely throughout the day. RP 8/19/13 at 8:9–9:4.

McFarland grew up with a passion for "mechanicking" and began work for BNSF as a carman in 1994. RP Vol. II at 231:6–11. He was happy with his job. *Id.* at 330:17–22. He and all of his coworkers agreed

that BNSF was a reasonably safe place to work. RP Vol. I at 100:12–14, 148:23–25, 171:7–9; Vol. II at 201:24–202:1, 306:2–4.

A. Carmen periodically used 12-pound sledgehammers.

Cross keys hold couplers onto railcars. RP Vol. I at 61:16–17. Carmen might install cross keys for about 20–30 minutes per day, a small percent of their daily work. RP 8/19/13 at 57:18–21, 40:23–41:1. Most cross keys (70–95 percent) slide in easily by hand. RP Vol. I at 78:1–4, 95:23–25, 113:9–12; CP 43:9–14; RP 8/19/13 at 16:9–11, 58:8–15. Of the small percentage that do not because of friction, a sledgehammer is normally used to finish the task. It is each carman's personal preference how hard to swing a sledgehammer, so long as he does not over-exert himself in violation of BNSF's Safety Rules. RP Vol. I at 158:20–25, 178:12–179:18; RP Vol. III at 386:5–15.

B. A 2007 Job Safety Analysis governed the task of cross key removal and reinstallation at the Pasco repair track.

At the Pasco repair track, the cross key installation task was explained in a JSA. At the time of McFarland's 2009 injury, the applicable JSA for "X-Key Removal/ Reinstall" instructed carmen to use a sledgehammer. CP 723. The JSA also identified the potential hazards: "potential pinch point" and "possible back strain or sprains." *Id.* In the

rare event that a sledgehammer could not get the cross key fully installed, carmen had numerous options: lubricating the cross key, changing the cross key, or adjusting the coupler to better align the cross key. RP Vol. I at 144:8–25; RP 8/19/13 at 61:20–25.

C. Some carmen wanted heavier sledgehammers.

BNSF provides 12-pound sledgehammers to carmen, having removed heavier sledgehammers in the 1990s because it was thought that they might contribute to back injuries. RP 8/19/13 at 12:23–14:8, 59:9–24.

At trial, some of McFarland's coworkers testified that they preferred heavier sledgehammers, claiming that, to them, larger sledgehammers involved less physical effort and fewer swings. RP Vol. I at 69:15–70:15, 94:19–25, 117:2–16, 122:25–123:19. There was no evidence, however, that BNSF had notice that using a smaller (or any) sledgehammer might cause a shoulder injury. None of the carmen who testified had ever injured their shoulders. RP Vol. I at 95:14–22, 138:6–11, 169:9–18; Vol. II at 197:24–198:6, 279:25–280:7. None complained about the size of sledgehammers in any written complaint, at a Safety Committee Meeting, or through a union grievance. RP Vol. I at 94:6–18, 137:25–138:5, 168:19–24; Vol. II at 217:21–218:10. BNSF supervisor Joseph Long had never received other reports of a shoulder

injury from installing cross keys or otherwise heard complaints about sledgehammer sizes. RP 8/19/13 at 21:5–8, 25:22–26:6. Long explained that installing cross keys was not a "big issue" task, and that any carman claiming to have had to repetitively pummel on a cross key was exaggerating. *Id.* at 41:4–6, 49:14–18. Similarly, general foreman for the Pasco mechanical department Ryan Risdon had not heard any sledgehammer complaints prior to attending trial as BNSF's representative. *Id.* at 147:13–19.

D. BNSF's Vancouver repair track asked Omega Industries, Inc., to develop a hydraulic press to install cross keys.

The hydraulic press was thoroughly covered at trial. Jeffrey Neufer, a former Vancouver carman who transferred to Pasco in 2004, testified that plans for a hydraulic press came about in Vancouver in the late 1990s. RP Vol. I at 184:10–185:5, 188:10–20. Neufer explained that:

> [a]fter some time of only being able to use the 10, 12 pound sledgehammers a fellow that I worked with, Bob Russell . . . worked with Omega Steel [sic] and was told by Vern Peterson to try to find some kind of method to install these cross keys.

Id. at 184:25–185:6. Neufer testified that Peterson "just thought all the carmen were complaining [that] the vibration and recoil from using the smaller sledgehammers . . . was tougher driving in the cross keys." *Id.* at

185:23–186:3. He explained that Peterson was trying to be innovative. RP Vol. II at 201:13–16.

E. Once a functioning hydraulic press was developed, it was tested and used in Vancouver and Seattle.

The first model hydraulic press totally failed. RP Vol. II at 201:4–8. Neufer testified that Omega redesigned and developed a second model in Vancouver after 2004. *Id.* at 204:6–22.[5] Risdon explained that Vancouver's safety assistant tried to help Pasco's safety assistant, Kelly Zimmerman, get the Pasco press working. RP 8/19/13 at 69:2, 138:21–25.

McFarland's appeal brief protests witnesses' use of the term "prototype" to describe the second model.[6] Manufacturer Omega drafted

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[5] Seattle car foreman Richard Lovin described how the second model worked:

> You used a forklift to grab it. It's pretty large. You drive it over to the car. You lift it up to the bottom of the center sill on the opposite side of the – where you insert the cross key. You have to install – there's a little leg that comes down, you would drop it. You screw it, it's adjustable, so that makes it contact with the floor. And then you place your cross key into the side of the car as much as it will go in by hand. You hook up a pump to the cross key pusher. There's a lever, you select a direction, it's a two-way pump. You push with the ram that comes out and make sure it's lined up square. And then you just hold it in and it goes in, enough to replace the retaining pin on the other side. . . . It is constant pressure that's applied to the – under the cross key. It will bind up, at which point you have to hit the car with a hammer to let it – vibrate it loose. So you're still striking the car with a hammer.

CP 50:4–51:1.

[6] Opening Brief of Appellant at 5.

its first instructions on how to use the hydraulic press in April 2011—nearly a year and a half after McFarland's injury. CP at 558:1–18. A juror's question, read by the judge at trial, asked Long whether the machine was still considered a prototype, and he answered yes. RP 8/19/13 at 51:18–20. Pasco carman Jeremy Putnam agreed. RP Vol. I at 183:3–5. Risdon explained why:

> [I]t doesn't exist in our hand and tool power catalog. We have to go through a methodical process to develop the processes and ensure that all the proper equipment is in place before we consider this a tool that is considered for consistent use that's in accordance with our programs on tool development and procurement.

RP 8/19/13 at 152:3–8.

"Prototype" debate aside, McFarland presented ample evidence at trial that the hydraulic press was used as an alternative means for installing cross keys in other BNSF facilities, including Vancouver where it was developed. Seattle car foreman Richard Lovin testified that Everett, Tacoma, and Auburn had the machine. CP 52:8–13. In addition to supervisor Neufer's testimony, McFarland also made it clear to the jury that Vancouver had been using a hydraulic press for years; Lovin was asked "[a]re you aware that there's been a pusher, hydraulic pusher, at Vancouver for maybe a dozen years?" *Id.* at 52:2–3. BNSF's liability

expert was similarly asked "did you know it's been used in Vancouver?" RP Vol. III at 407:2–3. McFarland testified that he learned of Vancouver's use of the hydraulic press in 2011 or 2012 from Vancouver's general foreman, who explained that there is "no sense in beating your brains out[;] we have a hydraulic pusher." RP Vol. II at 242:8–17.

McFarland also claims that Holm and Pillar would have testified that the hydraulic press was used in Seattle before his injury without any declarations to support that assertion. But the jury heard that the second model was used in Seattle. Lovin testified that Seattle acquired the hydraulic press around 2009. CP 41:18–21. Risdon testified that the hydraulic press has been used in Seattle. RP 8/19/13 at 135:22–136:10. Plaintiff's counsel asked Risdon, "[h]ow can you call it a prototype when it's been used in Seattle for years?" *Id.* at 139:6–7. Plaintiff's counsel also asked Risdon, "have you ever met with anyone from Omega to get any input from them on getting this working properly in Pasco the way they have in Seattle?" *Id.* at 145:15–19. BNSF expert Brian Heikkila was asked, "[d]id you by any chance go to Seattle to see where one's been in use for years?" RP Vol. III at 405:17–18. The jury heard ample evidence about the hydraulic press in Seattle without Holm and Pillar's testimony.

F. McFarland's injury occurred in December 2009, and at the time, he did not blame it on sledgehammers.

McFarland felt pain in his right shoulder in December 2009. RP Vol. II at 248:8–12. He filled out a BNSF Personal Injury Form in March 2010 and wrote that he had experienced "repetitive trauma due to the normal working of the job." CP 381. The form, among other things, asked whether a defect or problem existed with equipment or work procedures. *Id.*; RP Vol. II at 276:10–12. McFarland checked the "NO" box, testifying at trial that he did so because "a sledgehammer is a sledgehammer. It works like it's intended to do." RP Vol. II at 276:12–14. He did not mention sledgehammers anywhere on that form. *Id.* at 276:7–9. When a BNSF claims representative asked "[w]hat could BNSF have done different to avoid your condition?" McFarland answered, "[t]o tell you the truth, nothing." *Id.* at 331:10–15. When BNSF sent an interrogatory asking how his injury occurred, McFarland "forgot" to say anything about sledgehammers or cross key installers. *Id.* at 288:11–15. When asked at trial "[a]nd the work procedure of using a sledgehammer[,] you didn't have a problem with that?" McFarland testified "[n]o, the procedure for driving cross keys in is set forth in our JSA and we follow that. That was supposed to be done." *Id.* at 276:15–19. McFarland never claimed any of

the sledgehammers he had used were defective. In fact, the judge sustained BNSF's objection when McFarland's attorney described installing cross keys with sledgehammers as "very dangerous" during cross examination, because ***nobody***—other than McFarland's attorney—ever described that process as dangerous during trial. RP 8/19/13 at 138:6–14.

Dr. Kontogianis, McFarland's physician, testified that McFarland had an anatomic predisposition for rotator cuff disease, and that every activity—whether at work or not—that placed stress on McFarland's shoulder contributed to his shoulder pain. RP 8/19/13 at 104:7–10, 111:11–14. Dr. Kontogianis had never seen McFarland at work, did not know how he swung a sledgehammer, did not know how much overhead work he did, and did not know anything about his outside activities. *Id.* at 107:14–17, 108:18–20, 112:19–25. In fact, the doctor compared sledgehammer use to running marathons—either could be painful with a preexisting injury. *Id.* at 114:2–9. But an activity is not unsafe merely because someone who performs it is injured. The words "safe" or "unsafe" do not appear in the testimony of Dr. Kontogianis—McFarland's only expert.

G. Pasco did not have sufficient power for the hydraulic press.

It was undisputed at trial that the hydraulic press was not available at the Pasco repair track before McFarland's injury. Risdon testified that Pasco obtained the hydraulic press in 2011 (two years after McFarland's injury), a date that McFarland emphasized during closing argument. RP 8/19/13 at 145:22–24; RP Vol. III at 451:14. Similarly, it was not used at the Pasco repair track after McFarland's injury because of issues with the power source. Putnam, Neufer, McFarland, Long, Risdon, carman Kevin Schroder, carman Bert Barnes, and former carman David Fox all testified that it had not been used. *See, e.g.,* RP Vol. I at 66:1–11, 99:20–21, 164:24–165:6, 191:12–192:1; RP Vol. II at 212:13–21, 221:17–20, 244:22–25, 260:13–14; RP 8/19/13 at 33:25–34:9, 67:15–21, 150:9–15.

Putnam, as part of a team trying to get the hydraulic press up and running at Pasco, testified that the BNSF team would not write a JSA for the hydraulic press until it was operating properly. RP Vol. I at 166:1–7. He testified that the team found that the hydraulic press did not have the proper hoses, and the available power source provided only 3,500 pounds

of pressure when the hydraulic press required 10,000 pounds. RP Vol. I at 164:16–21. Risdon echoed Putnam's testimony. RP 8/19/13 at 76:18–22.[7]

Risdon also testified that Pasco's safety assistant had worked with Vancouver's safety assistant, and had also "done some extensive research and [was] working with the local hydraulics company who have looked at the power supply we have, the tool itself, [and advised that] what you have won't work." RP 8/19/13 at 77:2–5, 138:21–25. Risdon explained that Pasco had worked with the manufacturer. *Id.* at 67:24–68:4. Even at the time of trial in 2013, Pasco's power source did not work with the hydraulic press as the machine was configured, and the press was "sitting in the corner with dust on it." RP 8/19/13 at 150:9–11; RP Vol. II at 221:17–20.

H. A JSA for the hydraulic press was first drafted in 2011.

McFarland's second assignment of error involves the trial court's discretionary exclusion of a 2011/2012 JSA for "Zone 1 Mechanical," explaining the steps and potential hazards involved when operating the hydraulic press. CP 725–27 (copy provided in Appendix). McFarland argues that the 2011/2012 JSA is an "admission" by BNSF that the press

[7] McFarland ignored this testimony during closing argument: "How come they were able to go out and get this hydraulic cross key remover but they haven't been able to get the one to put in here in Pasco? Why? No explanation." RP Vol. III at 453:13–16.

"was an alternative means for installing cross keys" in Pasco. Opening Brief of Appellant at 23. This document did not yet exist at the time of McFarland's injury (nor did the manufacturer's own operating instructions); it was not drafted until 18 months later (and revised nine months after that). CP 725.

Additionally, McFarland did not list the three people named on the JSA (Blackwell, Connor, and Schilreff) as trial witnesses to authenticate and explain the document, and overcome its hearsay hurdle. For example, had the document been allowed, one of the three would have needed to explain what the "TST0001" means in the title at the top of the JSA. BNSF even offered to facilitate the 2011/2012 JSA witnesses' depositions, an offer that McFarland ignored. *Id.* at 255-56.

Setting aside hearsay issues and the lack of witnesses with personal knowledge to testify about the JSA, the document does not direct BNSF employees to ***use*** the hydraulic press; it simply outlines the "sequence of basic task steps" involved in operating the machine. Notably, this JSA contains ***twelve times*** the number of "Potential Hazards" as installing a cross key with a sledgehammer on the 2007 Pasco "X-Key

Removal/Reinstall" JSA. *Id.* at 723 (copies provided in Appendix).[8] If a JSA is meant to prove BNSF's knowledge of potential hazards, then a sledgehammer appears to have (much) less risk than the hydraulic press. The 2011/2012 JSA would not have helped McFarland's case.

I. The hydraulic press never replaced sledgehammers, even where it worked.

The functional hydraulic press was not a unanimous success. First, Pasco carman Putnam testified that it could only be used on about half of the cars: it would not work with "vertical," "hidden," or "floating" cross key configurations, which when combined make up about 50 percent of the cars BNSF handled. RP Vol. I at 170:5–21.

Second, if McFarland had been permitted to use the 2011/2012 JSA at trial, the jury would have seen that using the press involved eleven steps (many more than the 2007 JSA involving the sledgehammer). CP 725–26. Putnam, in his direct examination by McFarland, testified "[i]f I can hit a cross key 30 times or under and get it in, it's going to take longer

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[8] The potential hazards included, but were not limited to miscommunication; confusion on task; unexpected movement; back strains; overexertion; pinch points; improper clearance with car; damage to press and car; potential injury from compressed forces if improper fit or installation; awkward body position and lifting exertion; fall hazard of cross key while in coupler; improperly installed support leg will allow press assembly to twist away and down from car during compression of cross key; stored energy in pressurized hydraulic hoses; sudden release of stored energy; shifting of press assembly; pressurized hydraulic hoses; and pressure from possible shifted press assembly. CP 725–26.

to get the [hydraulic press] and hook it up and get it running." RP Vol. I at 173:6–9. Putnam testified he would always use a sledgehammer first because it was faster, and if the cross key does not give any resistance then there is "no point" in getting the hydraulic press. *Id.* at 158:20–22. Lovin, also called in plaintiff's case in chief, also said that a sledgehammer was easier than getting the hydraulic press. CP 44:1–6. Per Lovin, the hydraulic press had fallen out of favor at Seattle, and it was no longer being used. *Id.* at 51:8–15. Lovin concluded that the press was equally good as the "multitude of [other] options we have," but not any safer than a sledgehammer. *Id.* at 43:1–8, 45:23–46:12.

J. Sledgehammers are the standard tool used in the railroad industry to install snug cross keys.

Brian Heikkila, BNSF's expert, testified that railroads use standard methods to install cross keys, and that the Pasco installation process as it existed without the hydraulic press (i.e., installation using sledgehammers) was consistent with industry standards. RP Vol. III at 383:13–384:2. Heikkila had never seen such an installation device in a railcar shop before. *Id.* at 415:25–416:6. At least two other witnesses testified that although carmen install cross keys at railroads throughout the country, *id.* at 366:8–11, a hydraulic press is not used at any other railroads. RP Vol. II

at 201:9–12, CP 40:12–16, RP Vol. III at 384:19–21, 416:1–6. George Apostolou of Omega Industries, whom plaintiff deposed but decided not to call to testify at trial, testified during his deposition that Omega has never sold the press to any other railroad (or any other BNSF shop other than the few in Washington). CP 296:19–298:11.

2. The jury found in favor of BNSF.

On August 21, 2013, the jury issued a unanimous verdict that BNSF was not negligent. CP 602-604; RP Vol. III at 493–95.

3. The trial court showed remarkable patience in light of McFarland's inability to comply with deadlines.

The trial court rectified McFarland's repeated disregard of the applicable procedural rules, rescheduling trial and other deadlines multiple times to let McFarland conduct additional witness discovery. There is no justification for failing to properly identify and disclose his witnesses before trial.

A. McFarland waited to pursue depositions until trial loomed.

McFarland sued BNSF on January 26, 2012. CP 790-94. The court issued a scheduling order setting trial for January 30, 2013, with the discovery cut-off on November 19, 2012. *Id.* at 500. McFarland devoted

little effort to discovery in the discovery period. He did not ask to depose any witnesses in 2012.

(1) The trial court extended pretrial deadlines to give extra time to sort out witnesses.

In June 2012, the parties agreed to extend case deadlines to accommodate scheduling conflicts and additional response time for discovery requests. CP 498-99. The court reset trial for June 5, 2013, and the discovery cut-off for March 25, 2013. *Id.* at 496. In October 2012, the parties agreed to extend the discovery cut-off and disclosure deadlines a second time, giving plaintiff three more months to disclose primary witnesses, two more months to disclose rebuttal witnesses, and several weeks to finish discovery (until April 5, 2013). *Id.* at 490, 492-93. McFarland, however, did not initiate any depositions in 2012.

On January 22, 2013, McFarland produced his first primary witness disclosures, listing 10 fact witnesses and his medical providers. *Id.* at 782. He amended his witness list the same day. *Id.* at 775–79. McFarland did not ask to depose any witnesses in January or February 2013. On March 1, 2013, McFarland disclosed 12 rebuttal witnesses, including nine BNSF employees. *Id.* at 763-65. None of these witness lists included Holm, Pillar, or Russell.

(2) McFarland delayed depositions until three weeks before the second discovery cut-off.

On March 11, 2013, just three weeks before the re-set discovery cut-off, plaintiff finally asked to take a handful of depositions, including BNSF employees Dave Bertholf and Pasco safety assistant Kelly Zimmerman (these particular witnesses are important, as discussed below). CP at 460. BNSF timely responded and arranged for depositions of its employees and Omega employee Apostolou. *Id.* at 473, 486.

On March 13, 2013—12 days after his rebuttal witness disclosure deadline passed—McFarland added 10 additional witnesses to his rebuttal witness list, including employees from Omega and six BNSF employees, for a total of 32 disclosed fact witnesses. *Id.* at 756-58. This list did not include Holm, Pillar, or Russell.

On March 23, 2013, less than two weeks before the discovery cut-off, McFarland moved for a second trial continuance (misrepresenting that no prior extensions had been requested) "in order to permit plaintiff and his counsel adequate and sufficient time to prepare for trial" by taking numerous depositions. *Id.* at 481–82. BNSF opposed plaintiff's request, explaining that the deadline to seek a change of trial date had expired nine

months earlier, and that plaintiff had not timely conducted discovery in compliance with the civil case schedule orders. *Id.* at 471.

McFarland deposed Pasco safety assistant Zimmerman on April 4. *Id.* at 338. The third discovery cut-off passed on April 5. *Id.* at 196. On April 8, the judge ordered the parties to work with the court administrator to determine whether there was a mutually available trial date within four months, and allowed the depositions of BNSF employee Bertholf and Omega employees to be completed after the discovery cut-off. *Id.* at 220.

(3) BNSF cooperated with many of McFarland's untimely requests.

On April 9, 2013, BNSF sent a letter to plaintiff's counsel asking him to identify by the next day everyone else he wanted to depose (depositions being the basis for McFarland's motion for another trial continuance), so that the depositions could be arranged without delay. CP at 223-24. On April 10, 2013, plaintiff's counsel asked to depose 14 more witnesses. *Id.* at 242. None were Holm, Pillar, or Russell.

On April 11, 2013, BNSF responded in an attempt to accommodate plaintiff's requests, but noted that several of the witnesses were either not BNSF employees or had not been disclosed as a primary or rebuttal witness by either party. *Id.* at 249-250. Two witnesses (Risdon and Long) were deposed within days. *Id.* at 244, 245. On April 17, 2013, in response

to the court's order to find a mutually available trial date, BNSF sent a proposed stipulation to plaintiff's counsel to reset trial for July 10, 2013. *Id.* at 235. McFarland did not respond. BNSF wrote a second time; McFarland did not reply. *Id.* McFarland's counsel deposed two more witnesses (Kosaris and Apostolou) on April 24, 2013. *Id.* at 246, 247.

On May 1, 2013—nearly a month after the discovery deadline—plaintiff's counsel asked to schedule ***38 additional depositions***, including Russell. *Id.* at 239-40. The next day, McFarland filed a motion for yet another trial continuance. *Id.* at 237. McFarland lamented that he had been unable to communicate informally with witnesses to that point.

On May 7, 2013—more than a month after the discovery cut-off—BNSF sent plaintiff's counsel another letter regarding the recent avalanche of deposition requests, which stated in part as follows:

> [BNSF] previously agreed to make David Bertholf, Rick Lovin, Joshua Welch, and Joan Costa available for deposition after the discovery deadline per your request, however, you did not respond when we provided you with the dates they were available . . . .
> ***
> Regarding your most recent . . . request to depose those six (6) witnesses as well as 32 *additional* witnesses, with regard to the 32 additional depositions we will object to many of them as improper for a variety of reasons . . . .
> ***
> As indicated in correspondence to you prior to your May 1, 2013 letter, we are unable to secure the depositions of Tim

> Cousineau, Lloyd Ingraham, Mike Blackwell, Peter Amantatidis, Bob Russell, Vitaliy Kondor, Scott Clark, Isidoris Garifalakis, Jeremy Trueax, Michael Schultz, and Chris Hauck as they are neither employed by nor controlled by BNSF. Leaving aside . . . the fact most were never disclosed as witnesses by either party, we also understand that at least five of those witnesses do not reside within Washington.
>
> You have also requested the depositions of Jim Nelson, Peter Amantatidis, Bob Russell, and Vitaliy Kondor, however, neither party has identified any of these witnesses in primary or rebuttal witness disclosures . . . .
>
> Again, you have requested the depositions of Emery Connor and Christopher Schilreff . . . . If without further delay you provide a viable basis for taking those two depositions, we would agree to work with you toward facilitating them.[9]
>
> Finally, on May 1, 2013 (and for the first time in the 18-month history of this litigation), you requested the depositions of essentially every person identified in the parties' disclosures (and more). . . . [D]iscovery was closed for a month before you sought those depositions . . . .
>
> Again, and without further delay, we ask that you respond to our inquiries about your availability . . . .

Id. at 255-56.

The court granted plaintiff's motion for a third trial continuance and postponed trial until August 14, 2013. *Id.* at 204. The court

[9] As stated above, Connor and Schilreff were identified on the 2011/2012 JSA. CP 725.

retroactively set the discovery cut-off to the date of the signed order, June 3. *Id.* at 202. The existing witness disclosure deadlines did not change.

B. The opposition to BNSF's motion for summary judgment did not mention Russell, Holm, or Pillar.

BNSF had filed a motion for summary judgment on April 8, based, in part, on McFarland's failure to supply evidence or retain an expert to testify that BNSF had provided improper tools. CP 426–43. On April 29, McFarland opposed the motion, representing that two BNSF employees, Zimmerman and Bertholf (not Russell, Holm, or Pillar), corroborated his negligence theory about "BNSF's failure to provide and implement an 'automatic cross key remover' device at the Pasco Car Shop despite the fact that BNSF knew of this device as it had long already put such devices into service at other car shops to negate the need for manual sledgehammer blows." *Id.* at 318. McFarland claimed that his allegation was so obvious based on Zimmerman and Bertholf, that he did not need expert testimony to prove it (or defeat summary judgment). *Id.* at 319–20. The court denied BNSF's motion. *Id.* at 206. McFarland did not, however, call Zimmerman or Bertholf at trial, although both were listed on the Trial Management Report ("TMR") that was filed with the court. *Id.* at 79–80.

C. McFarland swapped 38 witnesses—including Russell—for one rebuttal liability expert.

Two weeks later, it became apparent that the stated basis of McFarland's motion—to depose witnesses—was not true. McFarland had instead decided to retain an expert in the case, filing a "Motion Regarding Utilization of an Expert Witness" on June 18. CP 200. He explained:

> it was anticipated that Plaintiff would be undertaking extensive discovery and depositions numbering approximately 40 depositions regarding the issues involved in this case. . . . Since the case has been [re]set for trial on August 14, 2013, such extensive discovery and depositions would likely not be able to be concluded. ***Therefore, in lieu of the extensive discovery and depositions referred to above, Plaintiff has retained one expert witness***, [Dr. Stephen Morrissey]. . . .[10]

Id. (emphasis added). McFarland thereby represented to the court and BNSF that Dr. Morrissey would be substituted for Russell and the others. On June 24, 2013, the court again ruled in McFarland's favor, allowing him to call Dr. Morrissey in rebuttal "if the trial judge believes said testimony/witness is appropriate." *Id.* at 148.

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[10] The 38 depositions referenced had included Russell (CP 239-40).

McFarland immediately amended his rebuttal trial witness list to add Dr. Morrissey.[11] McFarland also amended his supplemented rebuttal witness list again, *without leave of court,* and named seven new BNSF employees, failing to provide any descriptions of their purported knowledge. *Id.* at 741-42. This was the first time that McFarland identified Holm or Pillar.[12]

D. McFarland changed his witness approach again in Trial Management Reports.

On July 29, 2013, the parties submitted a joint TMR, narrowing the various witness disclosures and consolidating them into one list of anticipated trial witnesses. CP 59–80. McFarland dropped more than a dozen people who were identified on one of his many witness disclosures, including the three people named on the 2011/2012 JSA (Connor, Schilreff, and Blackwell), and two people directly involved in the development of the hydraulic press (Cousineau and Apostolou). McFarland then listed two witnesses who were missing from his many

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[11] McFarland disclosed that Dr. Morrissey would testify about the "use of mechanical equipment and/or sledgehammers in the installation and removal of cross keys, the failure to provide alternative methods, including mechanical equipment, failure to maintain mechanical equipment in good working order, and failure to provide proper training regarding the usage of mechanical means as an alternative to manual usage of sledgehammers and related matters." CP 744–45.

[12] McFarland does not claim that the court should have performed a *Burnet* analysis for the five other BNSF employees who were named on that list with Holm and Pillar.

witness disclosures: Russell and Gerry Harowicz (Harowicz is not at issue in this appeal). *Id.* at 79. On August 6, 2013, McFarland filed another TMR with the court. It included rebuttal expert Dr. Morrissey. *Id.* at 661–92.

E. The trial court ruled on these issues during motions in limine.

The parties also filed motions in limine on July 29. BNSF's motions 5, 13, and 23 are at issue in this appeal. CP 728–39, 102–04.

Motion in limine 5 asked the court to exclude reference to documents not in effect at the time of the incident under ER 401, 402, and 403, including the 2011/2012 JSA. *Id.* at 730-31. BNSF had also objected to the JSA under ER 602 and ER 802 on the TMR. *Id.* at 62. McFarland responded to the motion in limine simply that the JSA described the "alternative method" to sledgehammers and was "relevant" and "therefore admissible." *Id.* at 706. He did not dispute that the document was made years after his injury. He did not attempt to explain how he would authenticate and explain the document or link it to the Pasco repair track, and has not done so in his appellate brief.

Motion in limine 13 asked the court to exclude witnesses not previously or properly disclosed. *Id.* at 736. In response, McFarland did not try to justify his untimely, improper, and/or nonexistent disclosures.

Id. at 711–14. He did not address his motion to retain an expert in lieu of involving 38 witnesses. He did not dispute that he first disclosed Holm and Pillar more than two and a half months after BNSF filed its motion for summary judgment, three weeks after the court ruled on BNSF's motion, and long after the March 1, 2013, rebuttal witness disclosure deadline and the June 3, 2013, discovery cut-off. He simply implied that BNSF and the court should have assumed that any person mentioned by any other witness during any point in discovery would be called by plaintiff at trial, contrary to the purpose of witness disclosure rules. Counsel explained Russell's involvement with Omega Industries, but did not describe how Holm or Pillar were involved or otherwise make an offer of proof about their purported testimony. RP Vol. I at 53:11–54:4.

The third motion in limine at issue (23) asked the court to preclude cumulative lay testimony. *Id.* at 102–104. McFarland argued that it would be premature to rule on that motion. *Id.* at 717.

The court heard oral argument on motions in limine the day before trial, and granted the three motions on the first day of trial (August 15). *Id.* at 25–27. The judge explained his decision on motion in limine 13:

> For the record this case was filed by the plaintiff in January 2012. The first disclosure date for witnesses for the plaintiff was June 18th of 2012 with a discovery completion date of

> November 19, 2012. The first amended case scheduling order set the deadline for plaintiff's disclosure of witnesses for October 22, 2012 with a completion date for all parties of March 25th 2013. Then there was a second amended case scheduling order which set the plaintiff's disclosure of witnesses deadline for January 18 of this year 2013 with the discovery completion date being April 5, 2013. Then there was another amended case scheduling order which over all indicated discovery completion for all parties June 3rd 2013[.] Given this record, it seems appropriate to grant defendant's motion in limine number 13. And that is granted.

RP Vol. I at 50:7–25. Russell, Holm, and Pillar were thus excluded, along with Harowicz and the five other BNSF employees who had been disclosed at the end of June. McFarland has not appealed the exclusion of Harowicz or those five BNSF employees.

F. McFarland ultimately called only a handful of witnesses.

Trial began on August 15. Of the dozens of witnesses the court allowed him to choose from, McFarland selected nine to testify during McFarland's case in chief: the seven BNSF employees, Dr. Kontogianis, and himself. Despite the trial court's earlier ruling about Dr. Morrissey, McFarland chose not to ask to call him in rebuttal.

ARGUMENT

1. Brief summary pursuant to RAP 10.3(6).

McFarland's arguments that the trial court's failure to perform a *Burnet* inquiry and admit the 2011/2012 JSA warrants a new trial both fail, under the harmless error and abuse of discretion standards respectively, as well as waiver.

The evidence that the three witnesses would have given was cumulative of other trial testimony and would have been insufficient to prove negligence; thus, an incomplete *Burnet* analysis was harmless error.

Moreover, McFarland's gamesmanship supports the concurring opinion of three Washington Supreme Court justices in *Jones v. City of Seattle* that once a case reaches the courthouse steps, the trial court's duty to fairly and expeditiously manage the case should carve out an exception to *Burnet*'s presumption that a litigant may present non-disclosed witnesses. BNSF in good faith asks the Court of Appeals to modify the *Burnet* requirement and/or create new law pursuant to CR 11(a)(2) should the court disagree that harmless error occurred.

Third, the 2011/2012 JSA was properly excluded as irrelevant and confusing, and any abuse of discretion was harmless given McFarland's failure to list the proper witnesses to explain it.

Finally, McFarland's last assignment of error regarding his motion for a new trial contains no legal analysis and should be disregarded.

2. Exclusion of the witnesses' testimony was harmless.

A. The evidence would have been merely cumulative.

BNSF acknowledges that the trial court did not perform a full *Burnet* inquiry on the record when granting its motion in limine.[13] However, "rulings on witness exclusion are subject to review for harmless error."[14] Where no constitutional right is implicated, the harmless error test is "whether, within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred."[15] It is not reversible error to exclude evidence which is cumulative or has speculative probative value.[16] The omitted evidence need not be identical to what was admitted for it to be considered cumulative.[17] The Washington

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[13] Before excluding witnesses, "the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." *Jones*, 179 Wn.2d at 338 (citing *Burnet*, 131 Wn.2d at 494).

[14] *Jones*, 179 Wn.2d at 338.

[15] *Cobb v. Snohomish Cnty.*, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997).

[16] *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).

[17] *Id.* at 170; *see also Jones*, 314 P.3d at 397 (*Burnet* violation harmless where proposed testimony was irrelevant or cumulative); *Latham v. Hennessey*, 13 Wn. App. 518, 526, 535 P.2d 838 (1975) (excluded evidence was "cumulative at best and, as such, any error

(continued...)

Supreme Court has also explained that "[w]here a judgment or order is correct it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition."[18]

In this case, the witnesses' testimony would have been cumulative to other testimony at trial, violating the court's order on motion in limine 23. McFarland was able to establish the essence of that which he proposes Russell, Holm, and Pillar would testify about through the testimony of Neufer, Risdon, Lovin, and himself. McFarland's brief cites to *trial testimony* to explain the very facts he claims the witnesses would have also testified.[19] The exclusion was harmless because the jury had before it the facts it needed to make an informed decision.

B. The extra witnesses would not have proven negligence.

Even if the witnesses had testified, their "proposed" testimony would not have been able to show that BNSF was negligent, because whether there is a better or newer tool is not the standard under the FELA.

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[17](...continued)
in its exclusion may be deemed harmless"); ER 403.

[18] *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979).

[19] *See, e.g.*, Opening Brief of Appellant pp. 16–17.

(1) Whether a "better" tool existed is not the FELA standard.

The FELA imposes liability for railroad employees' work-related injuries caused by the railroad's negligence.[20] The United States Supreme Court and federal courts have repeatedly stated that negligence is not presumed from the mere fact of an accident or injury.[21]

A railroad need not provide an absolutely safe or perfectly safe working environment. "There is some degree of risk inherent in all work, and the level of risk that is acceptable for any given job depends on the specific nature of that job."[22] It is not enough for an employee to say a task or procedure was "dangerous," because "no employment is free from danger."[23] Thus, a railroad employer "is only required to eliminate those dangers 'that can reasonably be avoided ***in light of the normal requirements of the job.***'"[24] As such, a plaintiff "cannot recover simply by

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[20] 45 U.S.C. § 51 ("Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.").

[21] *See, e.g., Missouri Pacific RR. Co. v. Aeby*, 275 U.S. 426, 430, 48 S.Ct. 177, 72 L.Ed. 351 (1928) ("Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt.").

[22] *Lewis v. CSX Transp., Inc.*, 778 F.Supp.2d 821, 845 (D. Ohio 2011).

[23] *Aeby*, 275 U.S. at 430.

[24] *Lewis*, 778 F.Supp.2d at 845 (internal citations omitted) (emphasis in original); *see also Conway v. Consol. Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983).

showing that his injury is in some way related to his job" or by simply describing the tasks and physical demands involved in the position.[25] As the First Circuit explained: "[a] yardman dealing with moving cars cannot expect the same safety as a clerical worker . . . ."[26]

Additionally, the mere fact that there may have been a safer method does not automatically render the chosen method negligent under the FELA.[27] The inquiry is whether the railroad's method was reasonably safe, not whether it could have employed a safer alternative one.[28] Where "[t]he task at which [plaintiff] was injured was one that could be safely done by the method which he was told to use and was using," the railroad

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[25] *Potrykus v. CSX Transp., Inc.*, 2010 WL 2898782, *5 (D. Ohio 2010); *see Parson v. CSX Transp., Inc.*, 714 F.Supp.2d 839, 843–44 (D. Ohio 2010) (the plaintiff could not recover simply by showing that tasks that were "merely 'part of the work'"—caused her injury; rather, the plaintiff needed to show that the conditions she faced were *unreasonably* unsafe); *Tootle v. CSX Transp., Inc.*, 746 F.Supp.2d 1333, 1338 (D. Ga. 2010) (finding that the plaintiff's "testimony as to the physical demands of her position is only a description of her job and is not evidence that she [was] required to perform her job in an unsafe manner" (internal quotation marks omitted)).

[26] *Conway*, 720 F.2d at 223.

[27] *Chicago R.I. & Pac. R.R. Co. v. Lint*, 217 F.2d 279, 282–83 (8th Cir. 1954).

[28] *Stillman v. Norfolk & W. Ry.*, 811 F.2d 834, 838 (4th Cir. 1987); *Soto v. Southern Pacific Transp. Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981) ("That there were other, arguably more advanced, methods in use by the defendant for [accomplishing the task at hand] is of no significance where the method in use by [the plaintiff] was not an inherently unsafe one.").

is not negligent by failing to provide an alternative method or tool for accomplishing his task.[29]

(2) The excluded testimony was harmless because McFarland did not prove that the 12-pound sledgehammers were unsafe.

Setting aside the ample testimony that employees would generally choose to use sledgehammers over the press, the fact that the press existed at other repair tracks does not, by itself, prove sledgehammers were unsafe under the FELA.[30] This is independently fatal to McFarland's appeal.

McFarland produced no expert witness to discredit Heikkila's expert testimony about the standard of care and industry standards regarding McFarland's work environment. The "business of operating a railroad entails technical and logistical problems with which the ordinary

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[29] *Id.*

[30] *See, e.g., McKennon v. CSX Transp., Inc.*, 897 F.Supp. 1024, 1027 (D. Tenn. 1995) *aff'd,* 56 F.3d 64 (6th Cir. 1995) ("Plaintiff concedes that the maul he used was not defective in any way. He further concedes that the spike maul is a safe and appropriate way to drive spikes. In fact, Plaintiff's crew generally used spike mauls to drive spikes, rather than using the machine. ***That easier, automated means were available is irrelevant to the issue in this case. Based on the Plaintiff's own testimony, this Court finds that Defendant's failure to allow the use of the machine did not constitute negligence or create an unreasonably unsafe working condition.***") (emphasis added); *Lewis*, 778 F.Supp.2d at 837 ("the mere fact that Lewis felt that the new ballast regulators were easier to use . . . does not indicate that the old ballast regulators were inherently or unreasonably unsafe."); *Jennings v. Illinois Cent. R. Co.*, 993 S.W.2d 66, 73 (Tenn. Ct. App. 1998) ("the record is silent as to any injuries suffered by other Railroad employees while using the spike maul. ***In the absence of evidence that the use of the spike maul was an inherently unsafe method, we reject Jennings argument that the Railroad was negligent in failing to provide him with an automated tool to perform the same task.***" (emphasis added)).

layman has had little or no experience."[31] The average juror would possess neither sufficient knowledge of the working conditions of a repair track nor ergonomic factors to determine whether BNSF put McFarland at an unreasonable risk of injury. Therefore, expert testimony to the contrary was necessary to McFarland's claim, and he failed to provide it. Likewise, the record contains insufficient facts to permit the average juror to conclude BNSF knew or should have known that the risk of injury posed by the 12-pound sledgehammers was unreasonable. As a Virginia court held, ergonomic conclusions need expert testimony:

> Dr. Shennick testified that from an ergonomic standpoint, the work task assigned to the Plaintiff . . . placed the worker in an awkward position and required that forces be exerted in such a manner that injury could easily occur to the employee. . . . He concluded . . . that the manner in which the Plaintiff was required to compress the shock absorber was unsafe from an ergonomic standpoint. Those conclusions were not within the common knowledge or experience of the jurors.[32]

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[31] *Bridger v. Union Ry. Co.*, 355 F.2d 382, 389 (6th Cir. 1966).

[32] *Bowles v. Norfolk & W. Ry. Co.*, 50 Va. Cir. 231, *9 (1999) *aff'd sub nom. Norfolk S. Ry. Co. v. Bowles*, 261 Va. 21, 539 S.E.2d 727 (2001); *see also Lewis*, 778 F.Supp.2d at 844 ("there is no evidence in this case, other than the fact that Lewis developed carpal tunnel syndrome, that the tasks Lewis performed, the frequency with which he performed those tasks, or the duration of his work, created a work environment that was not reasonably safe. Nor is there any evidence that Lewis's work involved risks of which CSX knew or should have known or that there were any additional steps CSX could have taken to ameliorate possible risks.").

Despite this, McFarland did not ask to call ergonomist Dr. Morrissey to try to rebut BNSF's expert's testimony ("It's my opinion that that process and procedure is consistent with the industry standards, is consistent with my experience in the industry on the railroads I've worked on and those I've visited, and it was reasonably suitable for the performance of those tasks given the equipment and methods used." RP Vol. III at 383:19–24.).

C. McFarland waived his argument about Russell's testimony when he chose not to call Dr. Morrissey for the same subject(s).

McFarland's argument regarding Russell is waived because his witness selection at trial was strategic.[33] McFarland's summary judgment opposition brief represented that Zimmerman and Bertholf—not Russell—corroborated his theory that BNSF knew about the hydraulic pusher and had long already put it into service at other car shops. McFarland also filed a motion asking to present expert testimony as a substitute for Russell's involvement (and 37 other witnesses, Zimmerman not among them). As a result, the trial court allowed him to disclose the expert Dr. Morrissey in rebuttal and the parties made no further efforts to

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[33] *See, e.g., Reilly v. Natwest Markets Grp., Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) ("NatWest chose not to call either witness on the subject of document retention. Nor did it call any other witness who, it now claims, would have testified to some unspecified 'facts.' Because we cannot know whether any witnesses called would have been precluded had they . . . been offered at trial, we deem NatWest's challenge to their purported preclusion an issue not actually 'passed upon below' and therefore waived.").

conduct discovery about Russell or those other witnesses. McFarland listed both Zimmerman and Morrissey on his TMR for the same topics, but choose ***not*** to call either witness to the stand; thus, the trial court did not rule on the inclusion or exclusion of the testimony, and McFarland waived his argument that it was needed from Russell (or anyone else).

McFarland represented to the trial court and BNSF that he could retain Dr. Morrissey in lieu of involving 38 witnesses, including Russell. The court allowed McFarland to ask to call Dr. Morrissey in rebuttal, inviting him to raise this issue again as evidence developed during trial. But McFarland chose not to ask to call him to testify. By making that choice, McFarland did not get a ruling from the trial court about the admission of additional testimony on this topic, and thus McFarland's challenge is waived.[34] Accordingly, this court should decline to address it further. RAP 2.5(a). McFarland bears responsibility for that decision.

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[34] *See, e.g., State v. McWatters*, 63 Wn. App. 911, 916, 822 P.2d 787 (1992), as modified (Feb. 18, 1992) ("When the court asked . . . counsel later in the trial if he still intended to call the witness, counsel stated he did not intend to do so at that time. The witness was never called and the court did not rule on the admissibility of the testimony. In light of the facts, Mr. McWatters waived his right to have this issue reviewed. This failure deprived the trial court of the opportunity to consider the issue." (internal citations omitted)).

D. McFarland did not make an offer of proof regarding Holm or Pillar at trial.

As stated above, McFarland never explained to the trial court or BNSF what Holm or Pillar had to add to this case until he filed his motion for a new trial. Where evidence is excluded, ER 103(a)(2) requires that the offering party make the substance of it known to the court by offer or from the context within which questions were asked.[35] McFarland did not do so, so any error in their exclusion is waived.

3. This case's procedural history justifies a "courthouse steps" exception to *Burnet*.

The outcome of this appeal should warn litigants against attempting to plant alleged error on the record by simply naming minor witnesses on long-past-due, bare-bones witness disclosures (or none at all) and hoping that the court does not perform a *Burnet* test for each of them.

Requiring a full *Burnet* analysis at trial imposes a heavy burden on the trial court and heavy prejudice to the non-culpable party. The trial judge was in the best position to govern discovery, pleadings, and the

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[35] *See, e.g., Seattle First Nat. Bank v. W. Coast Rubber, Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985)("The fifth issue is whether the trial court erred by excluding the testimony of G. Ben Bryce, Sea-First's vice-president, regarding the intentions and additional agreements of the parties. Because Townsend did not make an offer of proof at trial, as required by ER 103(a)(2), error, if any, has been waived.").

admissibility of testimony and other evidence at trial. BNSF requests in good faith, pursuant to CR 11(a)(2), that the Court of Appeals modify existing law or create new law and adopt the approach recommended by Justices Gonzalez, Owens, and Fairhurst in their *Jones* concurring opinion. In that concurrence, Justice Gonzales pointed out that *Burnet*'s requirement makes sense before trial begins, but

> after trial has begun, under great time pressure to complete the case, litigants should not be entitled to the presumption that new witnesses will be allowed to testify. At that very late stage, fairness to the opposing party and efficiency for the court and jury require a shift in that balance.[36]

Here, allowing McFarland to make significant changes on the courthouse steps likewise implicates fairness and court efficiency because these changes occurred at a "very late stage."

Additionally, leaving proper witness disclosures until trial constitutes gamesmanship unless a particular witness was only made known to that party at that time—and the party has a good explanation why. "Washington has a long, clear tradition of condemning

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[36] *Jones*, 179 Wn.2d at 373. Justice Gonzales' concurrence goes on to explain that he believed "the trial court did not err in excluding the late-disclosed witness' testimony. Indeed, she would have been justified in excluding them earlier and more forcefully." *Id.* at 375.

gamesmanship in civil discovery."[37] In *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), then-Chief Judge Durham wrote:

> [T]he aim of the liberal [] discovery rules is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts **before trial**.

(internal citations and quotations omitted) (emphasis added). Simultaneously claiming that Holm, Pillar, and Russell were key witnesses but keeping BNSF in the dark about them is the kind of gamesmanship that our courts condemn.

This "blindman's bluff" did not exist in *Jones* or *Burnet*; therefore an alternate standard would not depart from the intent of the rule (to preclude drastic sanctions for a party's ***justified*** failure to comply with disclosure rules). For the reasons Justice Gonzales cites in his concurrence, the *Burnet* analysis should no longer apply by the time the

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[37] *Matter of Firestorm 1991*, 129 Wn.2d 130, 150, 916 P.2d 411 (1996).

parties report for trial.[38] The United States District Court of Arizona has succinctly described the unfair prejudice to the other party:

> Although Plaintiffs may have been able to anticipate that Defendants might call such a witness at trial, Plaintiffs were not . . . apprised of this information until discovery had closed, the motion for summary judgment had been decided, and the final pretrial conference was imminent, and therefore were not afforded an opportunity to conduct relevant discovery or formulate their case strategy to account for this evidence. Defendants have suggested that Mr. Glover may be deposed before trial . . . but the Court cannot conclude that such a deposition will eliminate all harm when avenues for other discovery have been foreclosed by the end of the discovery period and the firm trial date.[39]

Here, McFarland called them Holm and Pillar "crucial witnesses" (CP 589), however, ***McFarland never made an offer of proof or disclosed anything at all about Holm or Pillar, other than their names, until he filed his motion for a new trial.***[40] That not only underscores

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[38] *See also Lowy v. PeaceHealth*, 174 Wn.2d 769, 788, 280 P.3d 1078 (2012) ("hide and seek gamesmanship would be encouraged were we to adopt the hospital's position . . . .")

[39] *McCollum v. UPS Ground Freight, Inc.*, 2013 WL 105225, *3 (D. Ariz. 2013).

[40] Compare CP 741–42 (witness list; no description of knowledge) with CP 592 (motion for a new trial):

> Of similar, but not identical import [to the testimony of Russell] was the testimony Plaintiff intended to offer from Ed Holm and Andrew Pillar, two BNSF Carman [sic] currently employed by BNSF and working at its Seattle, Washington facility. Each of these witnesses had personal knowledge that the second generation (circa 2006) Omega hydraulic cross key installer was being successfully used at the BNSF freight car repair track in Seattle, Washington. As with the proposed testimony and evidence which Plaintiff sought to introduce from Robert Russell, the
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> (continued...)

prejudice to the opposing party, but demonstrates complete defiance of witness disclosure rules.

Assuming for argument's sake that Russell had something new to say (although he did not), BNSF would have been equally prejudiced if he had been allowed to testify. BNSF relied on McFarland's representation that he was not interested in Russell once McFarland was allowed to retain his expert. BNSF was not on notice that it should try to contact Russell (or the other 37 witnesses) just before trial on the off-chance that no the courthouse steps McFarland might change his mind about calling him. Further, McFarland represented that his seasoned investigator could not locate Russell until some vague date in "July 2013," months after being asked to, and that McFarland filed his TMR merely naming Russell "shortly" thereafter.[41] McFarland never provided Russell's contact information once he *was* located, in his TMR or any other way, which is far from a good faith effort to ameliorate any prejudice to BNSF.

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[40](...continued)

> testimony and evidence from Ed Holm and Andrew Pillar would have tended to refute BNSF's position that the cross key pusher: (1) was only a 'prototype'; (2) did not work; (3) had never worked; and (4) was not being used.

[41] *See* CP 585–87. McFarland's TMR was filed in August, not July 2013. CP 661–92.

In addition to going against the evidentiary rule discouraging cumulative testimony, allowing McFarland a new trial to call these three witnesses would negate the purpose of discovery, which is to "allow production of all relevant facts and thereby narrow the issues, and promote efficient and early resolution of claims."[42] His disclosure was so close to trial that it would be severely prejudicial to BNSF in light of the court's repeated resetting of trial and related deadlines, and disruptive of the trial court's duty to conduct fair, expeditious trials.[43] In the event that the Court disagrees that harmless error occurred, BNSF respectfully asks it to modify existing law, per CR 11(a)(2), and hold that trial judges are permitted to exclude those witnesses on the basis of prejudice to the other party (without a full *Burnet* analysis) once the parties report for motions in limine and trial, unless the moving party can show good cause for their nondisclosure. The *Burnet* approach required by the *Jones* majority, if unrestrained, may encourage the procedural gamesmanship and procrastination that took place in this case.

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[42] *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 698, 295 P.3d 239 (2013).

[43] *See Sanders v. State*, 169 Wn.2d 827, 851, 240 P.3d 120 (2010) ("the trial court has a duty to conduct the trial fairly [and] expeditiously . . . .") (internal quotation omitted).

4. The Court properly excluded the 2011/2012 JSA.

A trial court's decision to exclude evidence is reviewed for abuse of discretion.[44] A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons."[45] A trial judge has "wide" discretion "in balancing the probative value of evidence against its potentially prejudicial impact."[46]

Evidence must be relevant to the issues in the case.[47] McFarland cites *Seeberger v. Burlington N. R. Co.*, 138 Wn.2d 815, 982 P.2d 1149 (1999), for the proposition that "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." Opening Brief of Appellant at 45. *Seeberger* does not support McFarland's position. *Seeberger* states:

> [t]he existence of a safer or more suitable tool is irrelevant if it is not shown that the tool used is unsafe. The question before the jury would not have been whether the existence of

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[44] *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

[45] *Id.*

[46] *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996).

[47] ER 402.

> an alternative tool created a duty to provide it, but whether the tool actually used was reasonably safe.[48]

Here, as at trial, McFarland claims the hydraulic press would have been safer or easier. But, under *Seeberger*, the existence of a new tool is irrelevant if the existing tool used is not shown to be unsafe. McFarland cannot show that the 2011/2012 JSA was relevant to negligence, because he did not establish that the 12-pound sledgehammers were *unsafe*. The 2011/2012 JSA does not, contrary to McFarland's assertion, state anywhere that it "recommended" hydraulic presses over sledgehammers. None of his coworkers had sustained any injuries using sledgehammers. He produced no evidence of injuries from the 12-pound sledgehammers, other than his own, at BNSF or other railroads. No expert testified that repetitive sledgehammer swinging presented ergonomic risks BNSF should have investigated or that BNSF failed to follow any safety management principles. McFarland's medical expert never testified that

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[48] *Seeberger*, 138 Wn.2d at 827 (internal citations omitted). McFarland also cites *Stone v. New York, C., & St. L.R. Co.*, 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441 (1953). Subsequent cases interpret *Stone* as follows: "[i]f there are two different methods of work or pieces of equipment that could be used to perform a task and an employee is injured performing the task by the method or equipment selected by the railroad, then the issue of whether the alternative method or equipment should have been used is normally one for the jury." *Rice v. BNSF Ry.* Co., 346 S.W.3d 360, 369, fn. 8 (Mo. Ct. App. 2011). The problem for McFarland is that this issue *was* submitted to the jury.

sledgehammers were unsafe. McFarland himself testified that BNSF was a reasonably safe place to work.

Finally, setting aside that McFarland did not prove that 12-pound sledgehammers were unsafe, a plaintiff cannot use hindsight to prove foreseeability. RP Vol. III at 438:21–439:1. Negligence can be based only on what BNSF knew or should have known at the time of the injury. The manufacturer did not even make its *own* operating instructions for the hydraulic press until approximately 16 months after McFarland's injury (CP 558:13–18). McFarland's argument that the 2011/2012 JSA, made even later than the operating instructions, proved that BNSF should have eliminated 12-pound sledgehammers in 2009, cannot be sustained.

Ultimately the witness testimony was undisputed at trial that a few of BNSF's repair facilities had workable hydraulic presses after McFarland's injury. That is all that the 2011/2012 JSA could have established. Its exclusion was not an abuse of discretion.

5. This Court should decline to consider plaintiff's third assignment of error.

A. McFarland's argument is unsupported.

McFarland did not provide any legal argument or citations to support his third assignment of error: that the trial court allegedly "erred in

overruling and denying Plaintiff's Motion for New Trial Pursuant to Rule 59." Opening Brief of Appellant at 6. The Court of Appeals will decline to consider issues unsupported by cogent legal argument and citation to relevant authority.[49] BNSF respectfully submits that this Court should not consider this assignment of error.

B. The trial court did not abuse its discretion when it denied McFarland's motion for a new trial.

If this Court chooses to consider this issue, the trial court's denial of a motion for a new trial is reviewed for abuse of discretion.[50] A trial court does not abuse its discretion where the record contains substantial evidence to support the verdict.[51] The Court of Appeals considers the material facts in the light most favorable to the nonmoving party—here, BNSF—when reviewing the record for substantial evidence to support the trial court's decision.[52]

Here, the evidence overwhelmingly supported the verdict. The testimony that other carmen had never been injured installing cross keys, there were no different industry standards, larger sledgehammers were

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[49] *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989).

[50] *See Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008).

[51] *See Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997).

[52] *See Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

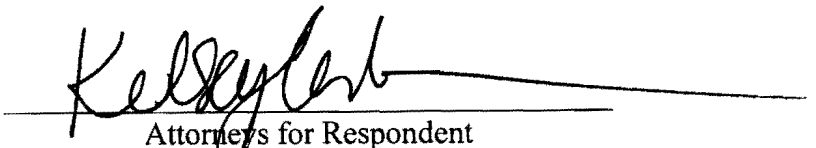
taken away to prevent injuries, the hydraulic press was not compatible with the Pasco repair track's power sources, and BNSF provided a reasonably safe place to work—or any one of these undisputed facts—defeated McFarland's claim. The jury was free to weigh the credibility of the witnesses and find, consistent with BNSF's expert's testimony, that BNSF simply was not negligent. Accordingly, the trial court did not abuse its discretion by denying the motion for a new trial.

CONCLUSION

A full *Burnet* analysis for non-disclosed, cumulative witnesses and the 2011/2012 JSA would not have changed the outcome at trial. The Court of Appeals should uphold the verdict and judgment in this case.

Dated December 19, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp, PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

I hereby certify that the original and one true and correct copy of BRIEF OF RESPONDENT has been filed with the Court of Appeals of the State of Washington Division Three via U.S. Mail and a copy served upon the following via legal messenger:

C. Marshall Friedman	Steven Lawrence Jones
C. Marshall Friedman, P.C.	Eyeman Allison Hunter Jones, PS
1010 Market Street, 13th Floor	2208 W. 2nd Avenue
St. Louis, MO 63101	Spokane, WA 99201-5417

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 19th day of December, 2014, at Seattle, Washington.

Tyler Campbell, paralegal

APPENDIX

JOB SAFETY ANALYSIS SHEET

DATE:08/15/00 UPDATE:09/21/07

SPECIFIC JOB TASK	X-KEY REMOVAL/REINSTALL	SUPERVISOR'S NAME: TIM COUSINEAU	APPROVED BY:
SPECIFIC LOCATION	PASCO REPAIR TRACK	REVISED BY: 08/29/06	REVIEWED IN CREW
REQUIRED PPE	HARD HAT, SAFETY GLASSES, SAFETY BOOTS, GLOVES, HEARING PROTECTION, KNEE PADS.	SAFETY BRIEFING: DISCUSS POTENTIAL HAZARDS!	PREFORM RISK ASSESSMENT, BEFORE BEGINNING TASK!

	SEQUENCE OF JOB STEPS	POTENTIAL HAZARDS	SAFE RECOMMENDED ACTION OR PROCEDURE
1	PERFORM A JOB SPECIFIC SAFEY BRIEFING:	POTENTIAL FOR PERSONAL INJURY	IDENTIFY AND DISCUSS POTENTIAL HAZARDS ASSOCIATED WITH JOB TASK, IT'S VERY IMPORTANT TO WEAR ALL THE APPROPRIATE PPE FOR THE JOB TASK YOU ARE PERFORMING.
2	INSPECT ALL TOOLS AND EQUIPMENT:	POTENTIAL FOR PERSONAL INJURY	ALWAYS BEFORE USING ANY TOOL OR EQUIPMENT INSPECT THEM FOR DEFECTS OR DAMAGE. NEVER USE ANY TOOLS OR EQUIPMENT THAT IS FOUND TO BE DEFECTIVE.
3	REMOVE CROSS KEY RETAINER:	POTENTIAL PINCH POINT	REMOVE COTTER KEY FROM CROSS KEY RETAINER USING THE APPROPRIATE KEY KNOCKER WITH THE APPROPRIATE HAND GUARD INSTALLED ON KEY KNOCKER AND HAMMER. DRIVE KEY OUT OF RETAINER LOCK, HEAT EAR ON RETAINER LOCK, AND STRAIGHTEN THE EAR USING A PONY BAR.
4	REMOVE CROSS KEY:	POTENTIAL PINCH POINT POSSIBLE BACK STRAIN OR SPRAINS.	REMOVE CROSS KEY, BY DRIVING IT OUT OF POSITION USING A SLEDGE HAMMER. ONCE CROSS KEY IS CLEAR OF DRAFT SILL. CROSS KEY CAN EASILY BE LIFTED OUT OF POSITION. OR USE HYDRUALIC X KEY REMOVER
5	REPLACE CROSS KEY:	POTENTIAL PINCH POINT, BACK STRAINS & SPRAINS.	POSITION CROSS KEY ON TOP OF TRAINLINE USE SLEDGE HAMMER TO DRIVE CROSS KEY THROUGH DRAFT SILL.
6	RE-INSTALL CROSS KEY RETAINER/RETAINER LOCK.	POTENTIAL PINCH POINT	POSITION RETAINER LOCK ON THE END OF CROSS KEY AND BENT OVER TOP EAR OVER RETAIN. APPLY COTTERKEY TO KEEP RETAINER PIN FROM COMING OUT OF PLACE.
7			
8	BNSF System Mechanical Policies reside in an electronically controlled environment Hard copies are "Uncontrolled and For Reference Only"		
9			

JSA – Zone 1 (TST0001)

Zone 1 Mechanical Job Safety Analysis	Job Title:	Hydraulic Cross Key Press	Date New:	06/27/2011
	JSA No:	TST0001	Date Rev:	03/03/2012
	Craft	Carmen	Analysis By:	Zone 1 Safety Committee & Mike Blackwell
	PPE Required:	Leather Gloves, Safety eyewear, Face Shield, proper hearing protection, Safety boots, Hard hat,	Approved by:	Emery W. Connor Christopher M. Schlreff

Seq.	Sequence of Basic Task Steps	Potential Hazards	Recommended Action or Procedure
1.	Perform a Job Specific Briefing with all personnel involved with the task.	Miscommunication, Confusion on Task, Not knowing the potential hazards.	Perform a Job Specific Safety Briefing with all personnel that will be assigned and involved with the task. The briefing must include a discussion of the general work plan, existing or potential hazards, and ways to eliminate or protect against those hazards. **Mechanical Safety Rule S-25.1**
2.	Apply blue signal protection per Mechanical Safety Rules S-24.0 through S-24.3, Local Directives and Procedures.	**⚠ DANGER** Working on an unprotected track has potential for life altering/major injury Unexpected movement, Slips/Trips/Falls, Back strains, overexertion, and pinch points.	Use proper body mechanics when lining switches and derails. Use three-point-Contact when getting on and off equipment. Watch footing when walking or lining switches and derails on ballast or in inclement walking surfaces, refer to JSA LS0003, Operating Switches and Derails. If hazards are found which inhibit the performance of this duty, protect the hazard and alert the supervisor. Make sure of proper hand break application to inhibit undesired train/locomotive movement. Refer to Mechanical Safety Rule S-24.2 Never use your feet to operate a hand break **Mechanical Safety Rule S-13.6.4.**
3.	Determine ability to use Hydraulic Cross Key press	Improper clearance with car, damage to press and car, potential injury from compressed forces if improper fit or installation.	Make sure press will fit in car, clearance from trainline, end of car, and wheels/truck. Ensure press will fit properly under center sill clear of all obstructions. Make sure Hydraulic hoses and connections are clear of pinch points and sharp edges that may potentially cause cuts and abrasions on hoses.

4.	Place coupler in draft gear pocket, loose place Coupler Cross Key in coupler and draft pocket as much as possible without over exerting.	Pinch points, awkward body position and lifting exertion. Fall hazard of cross key while in coupler.	Use mechanical means to lift and place coupler. Use proper body positioning and mechanics to lift cross key and watch hand and finger placement to avoid pinch points.
5.	Place press on end of forklift forks and locate under car.	Potential injury from compressed forces if improper fit or installation. Pinch points, awkward body positioning.	Ensure press will fit properly under center sill clear of all obstructions. Have coworker help spot press in proper location. Clearance from trainline, end of car, and wheels/truck.
6.	Install support leg at end of ram. Forklift forks will not support pressure of the ram without added support of leg.	Improperly installed support leg will allow press assembly to twist away and down from car during compression of cross key.	Hang support leg from press with supplied bolt, hand tighten bolt as necessary to prevent nut from falling off. Adjust threaded foot of support to contact with a firm base, blocking if necessary for level placement.
7.	Connect Hydraulic hoses to correct ports to extend and retract ram.	Stored energy in pressurized hydraulic hoses.	Cycle power pac-handle a few times to relieve any stored pressure in hydraulic hoses. Make sure Hydraulic hoses and connections are clear of pinch points and sharp edges that may potentially cause cuts and abrasions on hoses.
8.	Use hydraulic ram to press cross key into key slot of end sill and coupler. Relieve pressure and readjust support leg or cross key as necessary.	Sudden release of stored energy, shifting of press assembly, pressurized hydraulic hoses.	Slowly press cross key into place carefully observing press assembly and cross key for twisting or shifting. Stay clear of moving parts using mechanical means available and remote of ram control. Observe hydraulic hoses for leaks or twisting or kinking.
9.	After cross key is fully pressed into place retract ram piston.	Pressurized hydraulic hoses, release of stored energy	With piston fully retracted, cycle direction selector of ram control to neutral to ensure hydraulic pressure is relieved in hoses
10.	Disconnect ram power, remove support leg and disassemble press assembly for removal from car	Pressure from possible shifted press assembly, possible pressure from fork lift forks shifting, pinch points, bad body position.	Ensure there is no stored pressure from fork lift pushing down on support leg, watch hand placement and body positioning while removing support leg.
11.	Clean up work area, put tools away, finish installing coupler and cross key	Walking hazards, housekeeping	Complete installation of coupler and cross key per best practice and applicable JSA's. Pick up debris and tools from work area.

Photos