STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1987

Charles B. O'Neill,
Appellant,

vs.

BNSF Railway Company, a Delaware corporation,
Respondent.

Filed September 12, 2011
Affirmed
Ross, Judge

St. Louis County District Court
File No. 69DU-CV-09-38

Cortney S. LeNeave, Richard L. Carlson, Hunegs, LeNeave & Kvas, P.A., Minneapolis, Minnesota (for appellant)

Diane P. Gerth, Patrick J. Sweeney, Eric E. Holman, Ricke & Sweeney, P.A., St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Charles B. O'Neill worked for about 25 years for the BNSF Railway Company and, ten years after he transferred from physically challenging jobs as brakeman and switchman to a sedentary post, he began suffering from progressive deterioration of his

shoulder. Following a jury verdict in respondent railroad's favor on O'Neill's claims under the Federal Employers' Liability Act (FELA) and Federal Safety Appliance Act (FSAA) and denial of O'Neill's post-trial motions, O'Neill appeals and argues that the district court erred by refusing to submit the FSAA claim to the jury and denying his motion for judgment as a matter of law on the issue of causation. We affirm.

FACTS

From the mid-1970s to 1986, O'Neill worked as a switchman and brakeman in train yards belonging to Burlington Northern Railroad, which later became BNSF. From 1986 to the mid-1990s, he worked approximately 85% of the time as a brakeman and switchman and the remainder as a yardmaster, a sedentary position. He then became a full-time yardmaster.

O'Neill's job duties as a switchman and brakeman between the mid-1970s and the mid-1990s included tying handbrakes, getting on and off moving equipment, setting and disengaging rail handbrakes, throwing rail switches, coupling air hoses between railcars, climbing railcar ladders, hanging on the side of railcars, lifting draw bars, releasing broken "knuckles," and releasing pin lifters. O'Neill asserts that many of the rail switches were old and difficult to throw, that the hoses became fused and difficult to couple, and that the handbrakes were sometimes difficult to operate.

In December 2005, approximately ten years after he stopped working as a switchman or brakeman, O'Neill noticed pain in his right shoulder. He saw Dr. Graham Ritts, an orthopedic surgeon, in May 2006. He then submitted an injury report to BNSF. In it, he alleged progressive deterioration of his right shoulder as a result of repetitive

activity over a 25-year period while working as a switchman. In August 2006, Ritts operated on O'Neill's right shoulder, and O'Neill returned to work several months later with restrictions. In June 2008, Ritts examined O'Neill for left shoulder pain. In September 2008, O'Neill submitted another injury report to BNSF, this time alleging a "cumulative-trauma injury" to his left shoulder as a result of working for over 20 years as a switchman, switch foreman, and brakeman for BNSF and its predecessors. O'Neill retired in June 2009 for reasons unrelated to his shoulder condition.

In December 2009, O'Neill filed suit against BNSF, asserting two personal-injury claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (2008). In count one, he alleged that he had suffered cumulative musculoskeletal dysfunction and impairment of his upper body, torso, and shoulders as a result of BNSF's negligent failure to provide a reasonably safe place to work. In count two, he alleged that BNSF's violations of the Federal Safety Appliance Act (FSAA), 49 U.S.C. §§ 20301-20304, 21302, and 21304 (1988), had caused him injury.

At trial, O'Neill testified that, when working as a brakeman and a switchman, he encountered defective and hard-to-throw switches on a daily basis; that getting on and off moving railcars was stressful to his shoulders; and that he encountered defective pin lifters and handbrakes between 10% and 20% of the time. But on cross-examination, he was unable to identify any specific piece of equipment that had any defect, explaining that "there were just too many of them" to account for them all. O'Neill provided no documentation that he ever complained about any of the equipment that allegedly caused his injuries, and he admitted that although he became a full-time yardmaster in the mid-

1990s, he did not notice or report any pain in his shoulder until 2005. He admitted that he never had any pains, problems, complaints, or symptoms with his shoulders while working as a brakeman or switchman. O'Neill testified that, aside from a non-work-related shoulder injury in 1990 (from which he recovered fully), he never had any shoulder symptom while working as a brakeman or a switchman.

Each party called an orthopedic surgeon to opine as to whether O'Neill's employment activities caused his shoulder injuries. Dr. Ritts began testifying in favor of O'Neill's causation theory. But he stated, "[T]he whole [causation issue] to me hinges on whether [O'Neill] physically did all of the very strenuous activities for ten plus years leading up to 2006." He then acknowledged that he was unaware that O'Neill never had a symptom while working as a brakeman or switchman or at any time before 2005. Dr. Ritts also acknowledged that he was unaware that O'Neill was no longer working as a brakeman or switchman in 2006, and he stated that if O'Neill had not engaged in physically strenuous activities "from 2000 on," his opinion would be that O'Neill's injuries were "*not* causally related" to his railroad work. Dr. Ritts then opined that nonstrenuous yardmaster activity performed by O'Neill in the last decade of his career "didn't contribute" to his shoulder symptoms. And although Dr. Ritts said he felt "strongly" that O'Neill's shoulder tendonitis was related to the accumulated wear of O'Neill's 20 years of heavy work (and to his age and diabetes), he conceded that the absence of strenuous activity during the decade before the symptoms appeared in December 2005 could impact his opinion on causation.

Dr. Elmer Salovich, BNSF's expert witness, opined that O'Neill's work as a brakeman and a switchman did not cause his shoulder condition. Dr. Salovich stated that "there's no temporal relationship between [O'Neill's] work activity before he started working as a yard master and the current diagnosis and symptoms that he's developed in 2005." He explained that there is no temporal relationship between "something that happened 15 years ago or so and [what O'Neill] presented with in 2006." Dr. Salovich also testified that the fact that O'Neill never complained about any shoulder pains or problems while working as a brakeman and a switchman indicates that "he didn't have any activity at work that would cause him to have any injury to his shoulders."

After the close of evidence, BNSF moved for a directed verdict on the FSAA claim, arguing that O'Neill had failed to identify a specific piece of defective equipment that caused his injuries or that he experienced any symptoms while performing his brakeman or switchman tasks. The district court granted the motion and did not submit the FSAA claim to the jury.

The district court rejected BNSF's proposed jury instruction on causation in O'Neill's remaining (FELA) claim, which set out a proximate-cause standard, in favor of O'Neill's proposed instruction, which allowed the jury to find causation if "any negligence of the Defendant contributed in any way toward any injury or damage suffered by Plaintiff." The jury found that both parties were negligent but that neither party's negligence caused O'Neill's alleged shoulder injuries. It awarded O'Neill $22,771 for past and future pain and suffering, medical expenses, and lost wages.

O'Neill moved the court for a new trial under Minnesota Rules of Civil Procedure 59.01 on the grounds that the district court erred as a matter of law by granting BNSF's motion for a directed verdict and refusing to submit the FSAA claim to the jury and the jury's findings on causation and damages were against the weight of the evidence. O'Neill also moved for judgment as a matter of law (JMOL) under rule 50.02 on the issue of causation. The district court denied the motions, and this appeal follows.

D E C I S I O N

I

O'Neill challenges the district court's grant of a directed verdict in BNSF's favor on O'Neill's FSAA claim.

"A district court may grant a motion for a directed verdict when, as a matter of law, the evidence is insufficient to present a question of fact to the jury." *Wall v. Fairview Hosp. & Healthcare Servs*., 584 N.W.2d 395, 405 (Minn. 1998). "[T]he district court must treat as credible all evidence from the nonmoving party and all inferences that may be reasonably drawn from that evidence." *Id.* A directed verdict should be granted

> only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006). On appeal from a directed verdict, this court makes an independent determination of whether sufficient evidence existed to present a fact question to the jury. *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997). In making this determination,

we review the evidence in a light most favorable to the nonmoving party. *Id.* The issue here is therefore whether O'Neill has shown that sufficient evidence existed to establish a question of fact for the jury on his FSAA claim.

The FSAA "requires rail cars to be equipped with enumerated safety features, such as certain types of couplers, brakes, running boards, and handholds." *Union Pac. R. Co. v. Cal. Pub. Utilities Com'n*, 346 F.3d 851, 869 (9th Cir. 2003) (citing 49 U.S.C. § 20302) (2000)). If the equipment is not kept in the condition prescribed by the FSAA and an employee is injured, the employee may sue under FELA. *Magelky v. BNSF Ry. Co.*, 491 F. Supp. 2d 882, 888 (D.N.D., 2007). So although the FSAA does not provide a private cause of action for violations of the statute, an employee may recover for injuries caused by FSAA violations under the FELA. *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166, 89 S. Ct. 1706, 1708 (1969). "In such actions, the injured employee is required to prove only the statutory violation and thus is relieved of the burden of proving negligence." *Id.*, 89 S. Ct. at 1708. The employee must also prove that the injury resulted "in whole or in part" from the railroad's violation of the Act. *Id.*, 89 S. Ct. at 1708 (quoting 45 U.S.C. § 51).

To avoid a directed verdict on his FSAA claim, O'Neill needed to point to evidence that BNSF maintained or operated congressionally prohibited defective appliances and this defective equipment was the "sole or a contributory proximate cause" of his injury. *See Coray v. S. Pac. Co.*, 335 U.S. 520, 523, 69 S. Ct. 275, 277 (1949). To show that an appliance was defective, "[e]vidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to

function, when operated with due care, in the normal, natural, and usual manner." *Myers v. Reading Co.*, 331 U.S. 477, 483, 67 S. Ct. 1334, 1338 (1947) (quotation omitted). "Proof of an actual break or visible defect in [an] appliance is not a prerequisite to a finding that the statute has been violated. . . . The test in fact is the performance of the appliance." *Id.*, 67 S. Ct. at 1338.

O'Neill admitted that he was unable to identify any specific piece of defective railroad equipment or identify any particular instance when he used a defective appliance or when a railroad component failed to perform. He testified that over the years he experienced a broad range of equipment and appliances covered by the act, and that some of it was defective. But he could not identify any injury he suffered from using a specific piece of equipment at any specific time. And admitted that he never complained about any equipment. He also testified that he had no symptoms until about a decade after he stopped using the allegedly defective equipment.

O'Neill argues that his failure to specify a device is immaterial because in so-called cumulative trauma cases involving injuries resulting from prolonged and repeated exposure to defective conditions, FELA does not require claimants to specifically identify defective equipment, and requiring that he do so here frustrates the purpose of safety statutes, such as the FSAA. In support, he relies primarily on *Munns v. CSX Transp., Inc.*, 579 F. Supp. 2d 924 (N.D. Ohio 2008), in which a federal district court observed that a "general description of what caused plaintiff's injury suffices to bring a claim under the FELA." *Id.* at 930.

Munns does not lead us to reverse. Federal district court decisions do not establish binding precedent. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995). Also, *Munns* is distinguishable. In *Munns*, the claimant brought suit under the Locomotive Inspection Act (LIA),[1] claiming that he experienced disabling cumulative trauma injuries to his neck, back and shoulders as a result of riding in defective locomotive seats for approximately 15 years. *Id*. at 928. In responding to the railroad's motion for summary judgment, he was unable to "identify exactly how the locomotives were defective, which locomotives had defective seats, or which locomotives he used[.]" *Id*. at 930. The district court, citing to cumulative-trauma cases involving hearing loss, cancer, and carpal-tunnel syndrome in which plaintiffs survived motions for summary judgment without specifically identifying the horns, toxins, or equipment (respectively) that allegedly caused their injuries, held that Munns was not required to "identify specific locomotives to prevail" on the motion. *Id*. at 931. The court wrote that no specific defective equipment identification was necessary because "Munns's basic contention [was] that repeated exposure to defective seats had a cumulative effect—not that any one ride on a particular locomotive or seat caused his injury." *Id*. at 931.

Munns does support O'Neill's position that a cumulative-trauma fact pattern can, in some cases, establish a fact issue under the FSAA. And O'Neill is correct that safety statutes such as the FSAA and the LIA are to be applied liberally. *See Lilly v. Grand*

[1] Like the FSAA, the LIA is an amendment to FELA that imposes an absolute duty on interstate railroads to provide safe equipment and allows claimants to bring suit under FELA if a safety violation causes injury. FSAA and LIA cases apply similar reasoning. *See Steer v. Burlington N., Inc*., 720 F.2d 975, 977 (8th Cir. 1983).

Trunk W. R. Co., 317 U.S. 481, 486, 63 S. Ct. 347, 351 (1943) (observing that the FSAA "is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment"). But *Munns* differs from this case in significant ways. For the last two years of his employment, Munns had indicated in his journal the occasions when he rode a locomotive with a defective seat and submitted locomotive worksheets to his employer noting defective seats needing attention, placing the employer on notice of a defective condition. *Munns*, 579 F. Supp. 2d at 928–29. Munns identified a specific series of locomotives that he believed were defective and provided documentary evidence that he had alerted the railroad of these conditions. *Id*. at 930–31. The court in *Munns* noted similar cases in which claimants had survived summary judgment despite their failure to "point to all the locomotives, equipment or other conditions" they had encountered over the years. *Id*. at 931. O'Neill, by contrast, did not specifically identify *any* (let alone all) defective equipment; he kept no records and never complained about his work conditions until about ten years after he stopped using the allegedly defective equipment.

BNSF refers us to cases holding that a failure to identify specific defective equipment or an unsafe condition is fatal to an FSAA claim as a matter of law, including *Tezak v. BNSF R. Co*., 2010 WL 3211693, at *1 (W.D. Wash., 2010). There, the federal district court dismissed an FSAA claim when the plaintiff claimed merely to have "encountered" defective equipment and could not identify a particular defective device that caused his injury. The court also considered the effect of a plaintiff's failure to identify a specific appliance on the defendant railroad's ability to defend itself; noting

that the test of compliance with the FSAA is the "operating efficiency" of the regulated device, the court wrote:

> This test presumes a particular defective device . . . . Tezak bears the burden of proving that the safety device was operating inefficiently when he was injured, and BNSF is entitled to present contrary evidence. However, if Tezak is unable or unwilling to identify the particular devices, . . . then BNSF has no reasonable way to defend itself against such an allegation, other than a simple denial.

Id. at *2. Here, O'Neill's failure to identify any specific defective device similarly prevented BNSF from defending itself by proving that the device was working properly. More importantly, by failing to point to a specific piece of defective equipment, O'Neill deprived the jury of a fact issue as to whether BNSF violated the FSAA. We conclude that, on this record, O'Neill's conceded failure to identify any specific defective equipment is fatal to his claim.

Even had O'Neill identified defective equipment, his factual showing concerning causation was also insufficient to create a fact issue for the jury. Each party's medical expert testified that little or no basis existed to conclude that O'Neill's injury was caused by work last performed ten years before he experienced any symptoms. It is true that, generally, doubtful causation issues in FSAA claims should be submitted to the jury and not decided as a matter of law. *See Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433–34 (6th Cir. 2003). But no doubt exists here; according to both medical experts, the long span between O'Neill's operation of allegedly defective devices and the appearance of symptoms precludes the possibility of a causal connection. The district court properly granted BNSF's motion for a directed verdict on the FSAA claim.

II

O'Neill argues that the district court abused its discretion by denying his motion for a new trial on the grounds that the verdict was against the weight of the evidence as to causation and damages. The argument fails.

A. Causation

O'Neill contends that the verdict should be overturned and a new trial granted under rule 59.01(g) of the Minnesota Rules of Civil Procedure because the jury's finding that BNSF's negligence did not cause his injury was against the weight of the evidence. Rule 59.01(g) provides that the district court may grant a new trial when "[t]he verdict, decision, or report is not justified by the evidence, or is contrary to law."

> A new trial should not be granted unless the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment.

LaValle v. Aqualand Pool Co., Inc., 257 N.W.2d 324, 328 (Minn. 1977). On appeal from a denial of a motion for a new trial, we will not set aside a jury verdict unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict. *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999). The decision to grant a new trial generally rests within the sound discretion of the district court and will remain undisturbed absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann–Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

O'Neill asserts that the "uncontroverted evidence establishes a causal connection between BNSF's negligence and [his] injuries" and that the jury's finding to the contrary lacks evidentiary support. He also notes, correctly, that the relaxed test for causation under the FELA requires only a finding that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 448 (1957).

O'Neill's argument relies primarily on a somewhat confusing, and artfully edited, excerpt from the testimony of BNSF's expert witness, Dr. Salovich, in which the witness says that he and O'Neill's expert, Dr. Ritts, "agree" as to the cause of O'Neill's injuries. O'Neill contends that because Dr. Ritts had previously testified that BNSF's negligence caused the injuries, Dr. Salovich's statement is an admission that he also believes that BNSF's negligence caused O'Neill's injuries. A close reading of the transcript belies the argument. Dr. Ritts's testimony is more complex than O'Neill suggests, and the transcript does not support O'Neill's assertion that Dr. Ritts unequivocally connected BNSF's negligence to O'Neill's harm. As BNSF observes, and as is clear to us from the trial transcript, Dr. Ritts was unaware before trial about the ten-year gap between O'Neill's ceasing his allegedly injurious activities and the appearance of his symptoms. Dr. Ritts must have believed that O'Neill was engaging in strenuous work activities until the time he retired in 2009, when in fact O'Neill held the sedentary yardmaster position since the mid-1990s. Dr. Ritts's opinion about causation was based on this misunderstanding.

In cross-examination, Dr. Ritts acknowledged that if O'Neill did not engage in any strenuous activities "from 2000 on, you know, then [he] would say, well then [the injuries are] not causally related [to the activities]." Dr. Ritts further stated that the gap between the activities and the injury indicated that the activities "didn't contribute" to the injuries. On direct examination, Dr. Salovich testified that he agreed with Dr. Ritts's statement that without a closer temporal proximity, no causal relation connects the work and the symptoms. On cross-examination (in the testimony that O'Neill relies on), Dr. Salovich repeated that he "agrees" with Dr. Ritts. O'Neill asserts that this means that Dr. Salovich agrees that there *is* causation, but the context makes it certain that Dr. Salovich was testifying that he agrees with Dr. Ritts that there is no causation. The jury's finding of no causation is therefore consistent with the evidence and does not warrant a new trial.

B. Damages

O'Neill argues that the verdict should be overturned and a new trial granted under rule 59.01(e) of the Minnesota Rules of Civil Procedure because the jury's award of $22,771 was "manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze*, 587 N.W.2d at 648 (quotation omitted). Rule 59.01(e) provides that the district court may grant a new trial for "[e]xcessive or insufficient damages, appearing to have been given under the influence of passion or prejudice." A district court possesses "the broadest possible discretion" in determining whether a new trial should be granted for excessive or insufficient damages. *Bisbee v. Ruppert*, 306 Minn. 39, 48–49, 235 N.W.2d 364, 371 (1975). We will not reverse the

grant or denial of a motion for remittitur or additur unless there was "a clear abuse of discretion." *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987).

Rather than alleging jury passion or prejudice, O'Neill asserts that the damages awarded were not supported by the evidence and were inconsistent with the testimony. Dr. Ritts testified that O'Neill's future medical expenses would probably be between $10,000 and $15,000. The jury awarded him $12,500. The jury awarded him $5,000 for past and future pain and suffering, which is not inconsistent with O'Neill's testimony that he recovered quickly from his earlier shoulder surgery and has not had any shoulder problems since 2008. The award, particularly when considered in the light most favorable to the verdict, does not indicate that the jury did not consider all the evidence. Even if the award could be considered inadequate, O'Neill's argument would still fail. Where, as here, the jury has determined that no liability exists on the part of the defendant, and that finding is supported by credible evidence, an inadequate damage award does not justify overturning a verdict. *Radloff v. Jans*, 428 N.W.2d 112, 115–6 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988). The district court properly denied O'Neill's motion for a new trial.

III

O'Neill argues that the district court erred by denying his motion for JMOL on the issue of causation. The district court must grant a JMOL motion "if the moving party would have been entitled to a directed verdict at the close of the evidence." Minn. R. Civ. P. 50.02(a). JMOL "is appropriate when a jury verdict has no reasonable support in fact or is contrary to law," *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App.

2007), and "when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome," *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (quotation omitted).

Whether a district court properly decides a motion for JMOL is a question of law, which we review de novo. *Longbehn*, 727 N.W.2d at 159. We view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law. *Id.* (quotation omitted). We will not set aside the jury's verdict "if it can be sustained on any reasonable theory of the evidence." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). We will affirm the district court's denial of JMOL if the record contains "any competent evidence reasonably tending to sustain the verdict." *Id.* (quotation omitted).

O'Neill argues that JMOL is appropriate on causation because the consensus of the two experts at trial was that BNSF's negligence caused O'Neill's injuries. This argument is identical to the one O'Neill made in relation to his motion for a new trial, and is unavailing for the same reasons. Given O'Neill's testimony that much time passed between the alleged negligence and his harm, as well as the experts' testimony that the time gap defeats causation, the jury's verdict concerning damages is not manifestly and palpably contrary to the evidence.

O'Neill argues also that, in light of FELA's remedial purposes and intentionally low standard of causation, the verdict is contrary to the law. He cites to several cases for the proposition that "a trial court may direct a verdict on the issue of a railroad's

negligence, including causation, in FELA cases where the evidence supports only one reasonable conclusion." That proposition is undisputed, but O'Neill does not come close to demonstrating that the only reasonable conclusion here is a finding that BNSF caused his injury. O'Neill also requested, and received, a jury instruction on causation that reflected the low burden appropriate to FELA claims (instead of the proximate-cause language suggested by BNSF). Even applying the lower burden, the jury found that no causal relationship connected BNSF's conduct and O'Neill's injury. The finding is well supported. We conclude that the district court properly denied O'Neill's motion.

Affirmed.